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HUMANITARIAN INTERVENTION IN INTERNAL CONFLICTS IN THE POST COLD WAR ERA: POLITICAL AND LEGAL CHALLENGES

SEIF MOHAMED SALIM

UNIVERSITY OF NAIROBI
EAST AFRICANA COLLECTION

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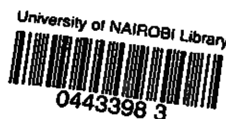

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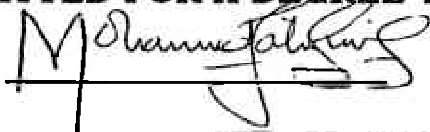
SIGN  DATE 18th - OCT - 04

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DR. JOSEPHINE ODERA

DEDICATION

This work is dedicated to all the men and women who have sacrificed their lives in order to save victims of civil wars in lands far from their homes. To all of them I say, your sacrifices will never be in vain

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LIST OF ACRONYMS

IDPs- Internally Displaced Persons

IHL- International Humanitarian Law

IL- International Law

ILC- International Law Commission

UN- United Nations

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ABSTRACT

This study attempts to look critically at the legal and political instruments used to justify, on one hand, and to constrain, on the other, humanitarian interventions in post cold war era conflicts.

The study appreciates that there is no clear dichotomy between legal and political instruments in humanitarian intervention. Indeed the legal and political instruments are inter-twinned and view the field of humanitarian intervention from the same conceptual lenses.

The study is divided into five chapters. Chapter one looks at the background and problem being studied, the objectives and hypothesis as well as methodology.

Chapter two looks at the legal and political instruments that are used to justify humanitarian intervention in post cold war era conflicts. This chapter recognizes that while, they are legal as well as political justifications for humanitarian intervention in post cold war era conflicts, the two are inter-twinned and there exist no clear dichotomy between the two. While Chapter three looks at the legal and political constrains to humanitarian intervention post cold war era conflicts. This chapter recognizes that the principle of state sovereignty is a major constrain to interventions in post cold war era conflicts.

Chapter four, looks critically and analytically at humanitarian intervention in post cold war era conflicts. The study appreciates the idea that the principle of state sovereignty is sacrosanct but no longer absolute. It also observes that the UN Security Council is the nearest thing to universally valid legal authority when comes to humanitarian intervention in post cold war era conflicts, but it rarely finds the political unanimity to enforce the principles.

Chapter five concludes the study by emphasizing on the need to come up with a legal and political framework to regulate and guide humanitarian intervention in post cold war era conflicts

CHAPTER ONE

BACKGROUND

INTRODUCTION

The dawn of the 21st century has witnessed a rise in new issues and preoccupations which present fundamentally different types of challenges from those that faced the world in 1945, when the United Nations was founded. The post cold war era has witnessed an increase in internal armed conflict that have eventually become internationalized; calling for international military and non military intervention under the auspicious of the United Nations. As new realities and challenges have emerged, so too have new expectations for action and new standards of conduct in national and international affairs. Several principles like that of non-intervention in domestic affairs of a state are being question. Military interventions in situations of internal armed conflict like Liberia have become necessary.

Many new international institutions have been created to meet these changing circumstances. In key respects, however, the mandates and capacity of international institutions have not kept pace with international needs or modern expectations. Above all, the issue of humanitarian intervention to prevent gross violations of human rights in post cold war era conflicts is a clear and compelling example of

concerted action urgently being needed to bring international norms and institutions in line with international needs and expectations.[1]

The current debate on intervention for human protection purposes is itself both a product and a reflection of how much has changed since the UN was established. The current debate takes place in the context of a broadly expanded range of state, non-state, and institutional actors, and increasingly evident interaction and interdependence among them. It is a debate that reflects new sets of issues and new types of concerns. It is a debate that is being conducted within the framework of new standards of conduct for states and individuals, and in a context of greatly increased expectations for action. And it is a debate that takes place within an institutional framework that since the end of the cold war has held out the prospect of effective joint international action to address issues of peace, security, human rights and sustainable development on a global scale.

While most of these values are set out in the United Nations Charter as fundamental purposes of the United Nations and while there are mechanisms within the Charter for the protection and enforcement of peace and international security, there are no equivalent provisions or

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[1] Acharya, Amitav. "Redefining the Dilemmas of Humanitarian Intervention." *Australian Journal of International Affairs* Vol. 56 No. 3 (2002): Pgs 373-381.

mechanisms in the Charter for the protection of human rights in post cold war era conflicts which are mostly internal conflicts. [2]

THE POST COLD WAR ERA DEBATE ON HUMANITARIAN INTERVENTION

The current debate about intervention for human protection purposes takes place in a context not just of new actors, but also of new sets of issues. The major debate centers on whether there exists or not dichotomy between internal and international affairs. This subsequently distinguishes those who support humanitarian intervention in internal armed conflict, from those who see no bases for intervention in domestic affairs of a state.

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The most security phenomenon since the end of the cold war as been the proliferation of internal armed conflicts. The civil wars which are raging in many parts of the globe are mainly the result of intra-state conflict and/or ethnic violence and are often characterized by the collapse of state institutions and the breakdown of law and order.[3] The big question has been, should the international community sit and watch atrocities take place for example as it happened in Rwanda or should military or non military intervention been used to safe-

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[2] Peterson, Frederick, The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations, Arizona Journal of International and Comparative Law 1998, Pg 872.

[3] Shawcross, William, Deliver Us from Evil, Simon and Schuster, New York. 2000, Pg 28.

guard human life and dignity? Liberalist would call for a quick intervention and realist would hide in the cover of sovereignty and non-intervention.

In most cases these conflicts have centered on demands for greater political rights and other political objectives, demands that were in many cases forcibly suppressed during the Cold War. In many states, the result of the end of the Cold War has been a new emphasis on democratization, human rights and good governance. But in too many others, the result has been internal war or what former United Nations Secretary-General, Boutros Boutros Ghali, describes as a "new breed" of civil war[4] which have resulted in ugly political and humanitarian repercussions.

In other cases, conflict has been directed towards the capture of resources and towards plunder. The weakness of state structures and institutions in many countries has heightened the challenges and risks of nation building, and sometimes tempted armed groups to try to seize and themselves exploit valuable assets such as diamonds, timber and other natural resources, not to mention the raw materials of drug production.

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[4] United Nations, Report of the Secretary-General on the Work of the Organization: Supplement to an Agenda for Peace, UN Doc. A/50/60-S1995/1, 3 January 1995, note 2.

These internal conflicts are made more complex and lethal by modern technology and communications and in particular by the proliferation of cheap, highly destructive weapons. Many occur in desperately poor societies where there is a single valuable commodity - like oil or diamonds - which rapidly becomes the fuel which sustains a full-time war economy. In these places, the state's monopoly over the means of violence is lost, and violence becomes a way of life with catastrophic consequences for civilians caught in the crossfire.

An unhappy trend of contemporary conflict has been the increased vulnerability of civilians, often involving their deliberate targeting. It is estimated that civilian casualties now constitute ninety per cent of the victims of armed conflict.[5] Sometimes the permanent displacement of civilian populations has been a primary objective of the conflict. Efforts to suppress armed (and sometimes unarmed) dissent have in too many cases led to excessive and disproportionate actions by governments, producing in some cases excessive and unwarranted suffering on the part of civilian populations. In many cases civilians have become the main targets and combatants employ starvation, slaughter, and various civilian and military technologies to expel or kill civilians, including demonstration killings and maiming.[6] In a few cases, regimes have launched campaigns of terror on their own

[5] Weiss, Thomas Military Civilian Interactions: Intervening in Humanitarian Crises, Rowman and Littlefield, Publishers Inc., Lanham, Maryland1999, Pg 1.

[6] Meron, Theodor, The Humanization of Humanitarian Law, American Journal of International Law, 2000, Pg 276.

populations, sometimes in the name of an ideology; sometimes spurred on by racial, religious or ethnic hatred; and sometimes purely for personal gain or plunder. In other cases they have supported or abetted terror campaigns aimed at other countries which have resulted in major destruction and loss of life.

Intra-state warfare is often viewed, in the prosperous West, simply as a set of discrete and unrelated crises occurring in distant and unimportant regions. In reality, what is happening is a convulsive process of state fragmentation and state formation that is transforming the international order itself. Moreover, the rich world is deeply implicated in the process. Civil conflicts are fuelled by arms and monetary transfers that originate in the developed world, and their destabilizing effects are felt in the developed world in everything from globally interconnected terrorism to refugee flows, the export of drugs, the spread of infectious disease and organized crime.

These considerations reinforce the view that human security is indeed indivisible. There is no longer such a thing as a humanitarian catastrophe occurring in a faraway country of which we know little. In an interdependent world, in which security depends on a framework of stable sovereign entities, the existence of fragile states, failing states, states who through weakness or ill-will harbour those dangerous to others, or states that can only maintain internal order

by means of gross human rights violations, can constitute a risk to people everywhere.[7]

All this presents the international community with acute dilemmas. If it stays disengaged, there is the risk of becoming complicit bystanders in massacre, ethnic cleansing, and even genocide. If the international community intervenes, it may or may not be able to mitigate such abuses. But even when it does, intervention sometimes means taking sides in intra-state conflicts.[8] Once it does so, the international community may only be aiding in the further fragmentation of the state system. Numerous previous interventions have show that, even when the goal of international action is, as it should be, protecting ordinary human beings from gross and systematic abuse, it can be difficult to avoid doing rather more harm than good.

Building a stable order after intervention for human protection purposes remains an equally great challenge. Finding a consensus about intervention is not simply a matter of deciding who should authorize it and when it is legitimate to undertake. It is also a matter of figuring out how to do it so that decent objectives are not tarnished by inappropriate means. As is widely recognized, UN peacekeeping strategies, crafted for an era of war between states and designed to

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[7] Alao, Abiodun. The Burden of Collective Goodwill: The International Involvement in the Liberian Civil War. Aldershot: Ashgate, 1998, Pg 88.

[8] Arend, Anthony Clark and Robert J. Beck. *International Law and the Use of Force: Beyond the UN Charter Paradigm*. London: Routledge, 1993, Pg 106.

monitor and reinforce ceasefires agreed between belligerents, may no longer be suitable to protect civilians caught in the middle of bloody struggles between states and insurgents.[9] The challenge in this context is to find tactics and strategies of military intervention that fill the current gulf between outdated concepts of peacekeeping and full-scale military operations that may have deleterious impacts on civilians.

There is a further challenge: crafting responses that are consistent. Thanks to modern media, some humanitarian crises receive a surfeit of attention, while others languish in indifference and neglect. Some crises are exaggerated by media coverage and ill-considered calls for action skew the response of the international community in an inconsistent and undisciplined manner. Yet perfect consistency is not always possible: the sheer number of crises with serious humanitarian dimensions precludes an effective response in each case. Moreover, there are some cases where international action is precluded by the opposition of a Permanent Five member or other major power.[10] But can the fact that effective international action is not always possible in every instance of major humanitarian catastrophe ever be an excuse for inaction where effective responses are possible?

[9] Annan, Kofi A. "Peace-Keeping in Situations of Civil War." *New York University Journal of International Law and Politics* Vol. 26 No. 4 (1994): 623-631.

[10] Arias, Inociencio F. "Humanitarian Intervention: Could the Security Council Kill the United Nations?" *Fordham International Law Journal* Vol. 23 No. 4 (2000), Pgs 1005-1027.

STATEMENT OF THE PROBLEM

Considering the issues, challenges and dilemmas that face humanitarian intervention in post cold war era conflicts, a number of critical questions emerge which are core to this study: What are the legal and political justifications for humanitarian intervention in post cold war era conflicts which are mostly internal conflict? What are the constrains of the legal and political instruments in humanitarian intervention in post cold war era conflicts and more so internal conflict? This study will be informed by these questions.

The ability and effectiveness of the international community to respond to genocide and humanitarian disasters with credible diplomatic instruments and efficient and sustainable military force has been constrained by the absence of substantial agreement within the Security Council and among the broader UN membership about what constitutes a threat to international peace and security and to what degree the principle of non-intervention in the domestic jurisdiction of a sovereign state can be overruled for example in the case of gross human rights violations and genocide.

There seem to be a paradigm shift in the humanitarian intervention system that traditional notions of national sovereignty should be set-

aside in cases of massive violations of human rights and genocide.[11] Rights of individuals and groups can override the principle of sovereignty. Even though none of the nation-states are keen to promote a complete abandonment of the principle of non-intervention, they maintain that acts of genocide and flagrant violations of individual rights can never be purely an internal matter. This judgment is underlined by the fact that government oppression and civil war often produce international problems such as massive flows of refugees and proliferation of illegal arms. For these reasons, Western governments have been strong supporters of a broad interpretation of what constitutes a threat to international peace.

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China and Russia have been sensitive about such issues due to their concerns about secessionist groups within their borders and – at least as far as China is concerned – a general disinclination to accept demands for human rights. For these reasons, they appear to be reluctant to accept measures that override the principle of non-intervention in the internal affairs of a sovereign state.[12]

As far as the Third World governments are concerned, there exists a widespread fear that humanitarian intervention could be used as a pretext for military intervention of strong powers in the affairs of weak

[11] Ayoob, Mohammed. "Humanitarian Intervention and State Sovereignty." *International Journal of Human Rights* Vol. 6 No. 1 (2002): Pgs 81.

[12] Ibid, Pg 102.

states. This fear is linked with memories of colonialism but also reflects the sensitive internal balance in many Third World countries with large ethnic or religious minorities who often harbour dissatisfaction towards the central government.[13] Furthermore, the selective nature of humanitarian interventions, even among the many cases in the Third World that could qualify for them, has raised doubts about the real motives for such interventions. For these reasons, traditional notions of sovereignty are regarded as a defence against the dynamics of an unequal world.[14]

Further to the above, its important to note that the UN is an organization dedicated to the maintenance of international peace and security on the basis of protecting the territorial integrity, political independence and national sovereignty of its member states. But the overwhelming majority of today's armed conflicts are internal, not inter-state. Moreover, the proportion of civilians killed in them increased from about one in ten at the start of the 20th century to around nine in ten by its close.

This has presented the organization with a major difficulty: how to reconcile its foundational principles of member states' sovereignty and the accompanying primary mandate to maintain international peace

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[13] Ayoob, Mohammed. "Third World Perspectives on Humanitarian Intervention and International Administration." *Global Governance* Vol. 10 No. 1 (2004) Pg 168.

[14] C. Clapman, Africa and the International System, Cambridge, Cambridge University Press, 1996,p 16.

and security with the equally compelling mission to promote the interests and welfare of people within those states.

State practice after the end of the Cold War concerning humanitarian intervention is neither sufficiently substantial nor has there been sufficient acceptance in the international community to support the view that a right of humanitarian intervention has become part of customary international law.[15]

OBJECTIVES

1. To identify and analyze the legal and political justification for humanitarian intervention in post cold war era conflicts.

2. Examine the legal and political constraints in the pursuit of humanitarian intervention in post cold war era conflicts.

3. To recommend how future humanitarian intervention in post cold war era conflicts can be made more effective.

HYPOTHESIS

1. There are legal and political justifications for humanitarian intervention in post cold war conflicts.

[15] Bailey, Sydney D. *Humanitarian Intervention in the Internal Affairs of States.* Basingstoke: Macmillan, 1996.

2. Humanitarian intervention in post cold war era conflicts is constrained by the principles of sovereignty and non-intervention.

JUSTIFICATION OF THE STUDY

Most of the studies on humanitarian intervention have concentrated on the nature and courses of conflicts that necessitates humanitarian intervention, the nature of humanitarian intervention, modalities of such interventions and the scope and composition of humanitarian missions. Little has been studied in the area of military humanitarian intervention in internal armed conflict and legal and political implications therein.

This study considers the inter-play of the legal and political aspects of humanitarian intervention by use of military in internal armed conflict, the profound impacts that these inter-plays have on the ability of the international community to carry out humanitarian intervention to protect victims of serious human rights abuses, the profound impacts that these inter-plays have on the global security stability, international political order and international law. It goes further to consider the basic legal and political considerations that could led to the formulation of an international legal foundation on which future humanitarian interventions can be carried out.

THEORETICAL FRAMEWORK

Broadly speaking, the legal, political and even moral arguments for and against humanitarian intervention fall into two categories: the realists on the one hand, for whom intervention undermines international order; and the liberalist and interdependence adherents, on the other, for whom intervention may be a moral obligation stemming from membership in a cosmopolitan community of humankind.[16]

Liberalism which seems to support humanitarian intervention in internal armed conflict posits that domestic and international orders derive their legitimacy and stability from their ability to protect individuals and groups from arbitrary coercion and violence.[17] To liberalists protection of individual rights is not only a valuable goal in itself but also a precondition for long-term domestic and international order. Liberalism links the relationship between order and justice on the state level and on the international level as well as about the relationship between the two levels.

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[16] Smith, Michael J., "Humanitarian Intervention: An Overview of the Ethical Issues," 1999, Pgs. 271-295 in *Ethics and International Affairs: A Reader*, ed. Joel H. Rosenthal, Georgetown University Press, Washington, DC.

[17] B.Buzam, The Idea of State and National Security, in R. Little and M. Smith eds Perspectives On World Politics, 2nd Ed., London, Routledge, 1991,Pg 37.

In short, domestic and international orders derive their legitimacy and stability from their ability to protect individuals and groups from arbitrary coercion and violence.

Liberalism, just like interdependence to some extend, sees no dichotomy between internal and international matters. Realists on the other hand draw a clear dichotomy between domestic and international affairs and calls for non-intervention on internal matters.

LITERATURE REVIEW

The literature pertaining to this study will be classified into two broad categories: first literature on the main issues surrounding the concept and practice of humanitarian intervention, the apparent clash between the concepts of state sovereignty and the international protection of civilians and the relationship between order and justice on one hand and legality and legitimacy of humanitarian intervention on the other; second the role of the UN Security Council regarding humanitarian intervention vis a vis the legal and political challenges faced by the international community on the issue; the efforts by the international community to formulate basic principles and options for undertaking future humanitarian interventions.

According to Barry Benjamin, the debate about intervention for human protection purposes takes place in a historical, political and legal context of evolving international standards of conduct for states and individuals, including the development of new and stronger norms and mechanisms for the protection of human rights. He says that human rights have now become a mainstream part of international law, and respect for human rights a central subject and responsibility of international relations.[18] Some key milestones in this progression have been the Universal Declaration of Human Rights; the four Geneva Conventions and the two Additional Protocols on international humanitarian law in armed conflict; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the two 1966 Covenants relating to civil, political, social, economic and cultural rights; and the adoption in 1998 of the statute for the establishment of an International Criminal Court. Even though in some cases imperfectly implemented, these agreements and mechanisms have significantly changed expectations at all levels about what is and what is not acceptable conduct by states and other actors.

Gutman, Roy and David argue that the universal jurisdiction established in the Geneva Conventions and Additional Protocols (as well as the Convention Against Torture) means any state party in

[18] Barry, Benjamin. "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities." Fordham International Law Journal Vol. 16 No. 2 (1991): 76-116.

which a person accused of the crimes listed in them is found can bring that person to trial. Universal jurisdiction is also available under customary international law, and associated state legislation, for genocide and crimes against humanity.[19] The recent Pinochet case in the UK and the conviction in Belgium for complicity in genocide of Rwandan nuns are an indication that the universal jurisdiction of these instruments is starting to be taken very seriously.

The change in law and in legal norms has been accompanied by the establishment, as has been noted, of a broad range of new international institutions and non-governmental organizations, concerned to monitor and promote the implementation worldwide of human rights and international humanitarian law - with the result that new expectations for conduct are increasingly accompanied by new expectations for corrective action.

Osler Fen argues that the concept of human security - including concern for human rights, but broader than that in its scope - has also become an increasingly important element in international law and international relations, increasingly providing a conceptual framework for international action.[20] He says that although the issue

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[19] Gutman, Roy and David Rieff, eds. Crimes of War: What the Public Should Know. London: W.W. Norton and Co., 1999. 108 - 116.

[20] Hampson, Fen Osler. *Madness in the Multitude: Human Security and World Disorder*. Oxford: Oxford University Press, 2001.

is far from uncontroversial, the concept of security is now increasingly recognized to extend to people as well as to states. It is certainly becoming increasingly clear that the human impact of international actions cannot be regarded as collateral to other actions, but must be a central preoccupation for all concerned. Whether universally popular or not, there is growing recognition worldwide that the protection of human security, including human rights and human dignity, must be one of the fundamental objectives of modern international institutions.

In considering changing expectations and conduct, nationally and internationally, Makinda, Samuel contents that it is impossible to ignore the impact of globalization and technology. He says that the revolution in information technology has made global communications instantaneous and provided unprecedented access to information worldwide.[21] The result has been an enormously heightened awareness of conflicts wherever they may be occurring, combined with immediate and often very compelling visual images of the resultant suffering on television and in other mass media. Killing and conflict occurring not only in major capitals but in distant places around the world has been brought right into the homes and living rooms of people all over the world. In a number of cases, popular concern over what has been seen has put political pressure on governments to

[21] Makinda, Samuel M. "Sovereignty and International Security: Challenges for the United Nations." *Global Governance* Vol. 2 No. 2 (1996): 149-168.

respond. For many of these governments, it has created a domestic political cost for inaction and indifference.

The arguments surrounding humanitarian intervention reflect a tension between concepts of order and concepts of justice. According to Ramsbotham and Woodhouse, the core of the debate surrounding the issue of humanitarian intervention lies in the tension between the two clusters of values reflected in the UN Charter, which 'intersect with each other and which may sometimes work at cross-purposes'.[22] These are state system values and human rights values. The two main components of the non-intervention norm can be recognized here: reciprocity and mutual recognition of juridical equality representing the first cluster, popular sovereignty and the self-determination of peoples the second.[23]

According to Makinda, this new awareness of world conditions and new visibility for human suffering has been the impact of globalization in intensifying economic interdependence between states. Globalization has led to closer ties at all levels and a pronounced

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[22] Ramsbotham, Oliver and Woodhouse, Tom, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization*, Polity Press, London. 1996, Pg 57.

[23] Pasic, Amir and Weiss, Thomas 1999, "The Politics of Rescue: Yugoslavia's Wars and the Humanitarian Impulse," pp. 296-333 in *Ethics and International Affairs*, ed. Joel H. Rosenthal, 2nd ed., Georgetown University Press, Washington, DC.

trend towards multilateral cooperation.[24] In the context of the debate surrounding the issue of intervention for human protection purposes, it is clear that the realities of globalization and growing interdependency have often been important factors in prompting neighbouring states and others to become engaged positively both in promoting prevention, and also in calling for intervention in situations that seem to be spiralling out of control.

Lillich, takes the debate further and argues that a critically important contextual dimension of the current debate on intervention for human protection purposes is the new opportunity and capacity for common action that have resulted from the end of the Cold War.[25] He argues that for perhaps the first time since the UN was established, there is now a genuine prospect of the Security Council fulfilling the role envisioned for it in the UN Charter. He further asserts that despite some notable setbacks, the capacity for common action by the Security Council was shown during the 1990s to be real, with the authorization by the Council of nearly 40 peacekeeping or peace enforcement operations over the last decade.

[24] Ibid, Pg 192.

[25] Lillich, Richard B. "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World." *Tulane Journal of International and Comparative Law* Vol. 3 No. 1 (1995): 2-17.

According to Donnelly, the end of the Cold War has brought about a substantial change in the concept of humanitarian intervention as well as in the practice. This change is rooted in different developments. One of the main factors is the changing nature of the international system; the end of superpower rivalry has to some extent removed the systemic constraints on intervention in domestic affairs. The end of the ideological confrontation has also largely undercut the rationale for supporting 'friendly' repressive regimes to prevent them from falling into the other camp.[26] As the Cold War had made non-intervention a universal norm, with the end of the Cold War, norms pertaining to the protection of individual rights have increasingly received general acceptance, particularly among the Western states. This resulted in a suitable political atmosphere for initiating interventions.

Woodhouse, Tom and Ramsbotham assert that humanitarian interventions are not only responses to the suffering caused by repressive governments, but also they are directed to situations produced by internal conflicts, state disintegration and state collapses, as a result of which human rights are grossly violated. The overwhelming majority of armed conflicts in the post-Cold War era are

[26] Jack Donnelly, 'Human Rights, Humanitarian Crisis, and Humanitarian Intervention', International Journal, Vol. XLVIII, No. 1, 1993, pp. 628, 632;

internal or civil war.[27] Oudraat takes this argument further and says that this has resulted in an increase in the number of situations crying out for humanitarian involvement, and the effects can be seen in the growing number of UN Security Council Resolutions under Chapter VII. In some cases, the Security Council defined gross violations of human rights and civil conflicts as a 'threat to international peace and security' and decided to impose economic sanctions or authorised the use of force. Since 1989, it has imposed economic sanctions on 14 occasions (compared with twice between 1945 and 1988), and used force 11 times other than for self-defence (as opposed to three times between 1945-1988).[28]

Ramsbotham on his part argues that the humanitarian component, namely the definition of humanitarian crisis, is no longer confined to protecting fundamental human rights, but is extended to include the question of upholding international humanitarian laws of war (war crimes) and providing humanitarian assistance (gross deprivation and starvation).[29]

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[27] Woodhouse, Tom and Ramsbotham, 'Peacekeeping and Humanitarian Intervention in Post-Cold War Conflict', in T. Woodhouse, R. Bruce and M. Dando (eds.), Peacekeeping and Peacemaking: Towards Effective Intervention in Post-Cold War Conflicts, New York, Macmillan Press Ltd, 1998, pp. 40-41.

[28] Chantal de Jonge Oudraat, 'Intervention in Internal Conflicts: Legal and Political Conundrums', Carnegie Endowment for International Peace Working Paper 15, August 2000, p. 11.

[29] Oliver Ramsbotham, 'Humanitarian Intervention: The Contemporary Debate', in Roger Williamson (ed.), Some Corner of a Foreign Field, London, Macmillan Press Ltd, 1998, p. 64;

Strict definitions in the Cold War period created the idea that intervention was illegal per se because it breached the principles of sovereignty and self-determination. But the shift of focus from Article 2(4) to 2(7) of the UN Charter has opened the whole matter to reinterpretation and we have a situation where, as Greenwood states: "... it is no longer tenable to assert whenever a government massacres its own people or a state collapses into anarchy that international law forbids military intervention altogether."[30]

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Instead of self-help by states, most of post-Cold War interventions were in some way related to regional or global interventions and legitimised or licensed by UN Security Council resolutions. This increasing UN involvement was so visible that, even in non-UN interventions, those intervening have attempted to link the issue to the UN.

Catherine Guicherd asserts that apart from increasing UN involvement, multilateralism was another change in the agency the end of the Cold War brought about.[31] Many observers have always been suspicious of unilateralism due to the high risk of abuse. As

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[30] C. Greenwood, 'Is There a Right of Humanitarian Intervention', The World Today, February 1993, p. 40.

[31] Catherine Guicherd, 'International Law and the War in Kosovo', Survival, Vol. 41, No. 2, 1999, p. 21.

stated before, Cold War conditions made a multilateral intervention difficult to realise, but, in the post-Cold War period, multilateralism became one of the necessary conditions for humanitarian intervention or, in the words of Finnemore, "humanitarian military intervention now must be multilateral to be legitimate".[32]

Donnelly is quite assertive in this matter; apart from thinking that multilateralism is largely immune to most of the arguments raised against unilateralism, he further claims, "if humanitarian intervention has a real future, it is through multilateral action".[33] Nevertheless, it must also be noted that the remaining division from the Cold War era, namely the North-South division, continues to pose obstacles. Knowing that it would be their sovereignty that is overridden, developing countries have been maintaining traditional notions of non-intervention and state sovereignty and, in many cases, opposing multilateral actions justified by an implied doctrine of humanitarian intervention or at least to their becoming a norm.

Comfort Ero and Suzanne Long argue that it is upon this background that some cases of humanitarian interventions have been developed in the post-Cold War period. In this regard, UN Security Council

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[32] Finnemore, op. cit., p. 176.

[33] Christopher M. Ryan, 'Sovereignty, Intervention, and the Law: A Tenuous Relationship of Competing Principles', Millennium: Journal of International Studies, Vol. 26, No. 1, 1997, p. 94.

Resolution 688, about the situation in Northern Iraq, was the watershed, followed by the cases of Rwanda, Somalia, the former Yugoslavia (Bosnia), Haiti, Liberia, Kosovo and Sierra Leone.[34]

As to the question of when to intervene in a domestic crisis, there has not emerged a consensus among the states or within international organisations, including the UN. The UN practice was developed on a case by case approach and it refrained from any codification about the criteria for possible cases of humanitarian intervention in the future. Yet, out of the cautious approach of the UN and the arguments of the observers, a strong tendency can be discerned. Comfort Ero and Suzanne Long go further and say that when we look at the UN involvement in these cases, the most salient point is the tendency to link human rights and widespread human rights violations within a country to Chapter VII of the UN Charter, starting from Resolution 688.[35] In this way, the traditional understanding that humanitarian intervention is unlawful because it involves neither self-defence (Art. 51) nor enforcement action under Chapter VII, was overcome. Furthermore the ban on UN intervention in domestic affairs without the consent of the target state regulated in Article 2(7) is eliminated since it makes an exception in that "this principle shall not prejudice the application of the enforcement measures under Chapter VII".

[34] Comfort Ero and Suzanne Long, 'Cases and Criteria: The UN in Iraq, Bosnia and Somalia', in Roger Williamson (ed.), Some Corner of a Foreign Field, London, Macmillan Press Ltd, 1998, pp. 157-161.

[35] Ibid pp. 157, 164.

But, Anne-Julie notes that the most interesting point is the fact that there is no reference to Articles 55 and 56 of the UN Charter, which require member states to take joint and collective action for the achievement of universal respect for, and observance of human rights and fundamental freedoms for all. Instead of referring to these articles in recent UN authorisations, a linkage between threat or breach of international peace and the situation at hand was made.[36] She argues that by doing so, such an intervention was not justified on a purely humanitarian basis, instead it was considered as long as it was related to international peace and security.

Fixdal, Mona and Smith assert that this broad interpretation of 'threat to peace and international security' in the post-Cold War era has resulted in considering internal conflicts and humanitarian catastrophes with cross-border repercussions as constituting threats to international peace and security.[37] Therefore, the crises whose external implications are severe enough to make an exception to the non-intervention principle have warranted and may, in the future, warrant humanitarian intervention.

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[36] Semb, Anne-Julie. *The Normative Foundation of the Principle of Non-Intervention.* Oslo: International Peace Research Institute, 1992.

[37] Fixdal, Mona and Dan Smith. "Humanitarian Intervention and Just War." *Mershon International Studies Review* Vol. 42 No. 2 (1998): 283-312.

Yet, some states object to this broad interpretation of humanitarian intervention authorised by the UN Security Council on the basis that the Security Council may act arbitrarily in some future cases. Furthermore, the argument that the Security Council, under the Charter and its practices, is not entitled to authorise humanitarian intervention based purely on massive violations of human rights with no cross-border repercussions raises questions about the legal and structural limits of the Security Council on matters of humanitarian intervention.

As Oudraat contents, although the UN authorised most of the post-Cold War interventions, the practice of intervention without the UN umbrella has not disappeared completely. The effects of this reality can be observed in theoretical discussions as well. At the beginning of the 1990s, the debate about humanitarian intervention was mainly focused on the question of whether violations of human rights constitute a threat to international peace and security, hence legitimise humanitarian intervention. But, later on the linkage between human rights and security was largely recognised and humanitarian intervention through UN authorisation did not create so much controversy. By the end of the 1990s, especially with the NATO intervention in Kosovo, the debate has gained a new dimension raising the question whether such interventions need UN authorisation.[38]

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[38] Oudraat, op. cit., pp. 1,6.

Himes argue that despite the fact that there is no consensus in the legal doctrine, most legal scholars have defended the legality of the alternative of self-help for a long time, even as early as the 1960s and 1970s.[39] For example Verwey, one of the pioneers of this genre, maintains the necessity of keeping this alternative alive and underlines that it must be regulated in a strict manner. This way of thinking goes further, confining the term humanitarian intervention to self-help by states and not including interventions under the UN in this category.[40] Tanja saya that even some proponents of a right to humanitarian intervention without UN authorization argue that measures decided upon by the Security Council under Chapter VII cannot fall within the doctrine of humanitarian intervention, rather they might be called 'enforcement measures for humanitarian purposes'. For them, this is necessary to prevent further misunderstanding and ambiguities about the concept.[41] But Guicherd counter this assertion and says most lawyers are against the recognition of such a right, which would allow self-help by states, mainly in that it would violate the Charter's prohibition on the use of force.[42]

[39]Himes, op. cit., pp 11.

[40] Ramsbotham, 'Humanitarian Intervention 1990-5: A Need to Reconceptualize?', op. cit., p. 448.

[41] Tanja, op. cit., p. 89.

[42] Guicherd, op. cit., p. 23.

Along the same lines, Weiss and Chopra assert that politically, self-help is generally opposed on the basis that it would lead to abuse or disorder in the international system. According to the opponents of self-help by states, it might be difficult to distinguish between humanitarian intervention and realpolitik, hence, as a way to reduce the danger of abuse, it is necessary to restrict humanitarian intervention to those cases carried out under the UN umbrella and refuse any kind of self-help.[43]

Smith on the other hand says that proponents of a right to self-help underline the need to consider two points. First, growing global awareness about human rights makes gross violations of human rights intolerable. Second, UN actions may not respond in an effective and timely way to a crisis. Hence, in their view, the option of self-help must be recognised as a back-up policy to interventions under the UN framework. Furthermore, keeping this alternative as a viable policy option is ethically justified as well.[44] Yet, it must be noted that those who argue for such a right to self-help, both politically and legally, should not be seen as those who are not concerned with the problem of abuse or disorder; on the contrary the proponents of the right to self-help are also aware of the possible dangers of accepting such a right. It is for this reason that the attempts to formulate the necessary

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[43] Weiss and Chopra, op. cit., p. 106.

[44] Michael J. Smith, 'Humanitarian Intervention: An Overview of the Ethical Issues', Ethics & International Affairs, Vol. 12, 1998.

criteria to regulate humanitarian intervention come mainly from these scholars.

There were interventions without UN authorisation in the post-Cold War period, such as the Economic Organisation of West African States' intervention in Liberia, the US-, UK- and French-led interventions in Iraq since 1991 and NATO's intervention in Kosovo.[45] The Iraq and Kosovo cases are quite complicated in the sense that there were prior Security Council resolutions defining the situation as a threat to peace, but none giving explicit authorisation for the use of military force, as stated before. Thus, the debate about these cases has not been settled among scholars.

Despite the increase in post-Cold War practice, it cannot constitute precedents for a doctrine of humanitarian intervention, nor can it establish a norm in customary international law. Nevertheless, Williamson says that although there is no clear legal doctrine of humanitarian intervention, when it is carried out through the UN, humanitarian intervention has become a de facto norm at least in the declarations and practices of the Western democracies.[46]

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[45] Ronzitti, op. cit., p. 52.

[46] , Roger Williamson 'The Foreign Policy of Western Countries: The Problem of Intervention', Some Corner of a Foreign Field, London, Macmillan Press Ltd, 1998, p. 210.

There are strong moral and political arguments related to the creation of a humane international legal order. These arguments speak in favour of the legitimacy of humanitarian intervention without Security Council mandate in cases where the most serious crimes against individuals take place, and the Security Council is blocked. On the other hand, such interventions, should they become legal under international law, might blur the hard - earned and now generally recognised prohibition on the use of force between states, put the fragile collective security system at risk and thus undermine basic tenets of the international legal order in its present stage of development.

In addition to the above, the risk of abuse of a legal doctrine is real and should be taken into account when considering whether to invoke a legal right of intervention without Security Council authorisation or to simply justify intervention without Security Council authorisation case-by-case on political and moral grounds outside the law.

METHODOLOGY

This study was based on both primary and secondary data. Primary data involved unstructured interviews with officials in the United Nations Offices and other related International Organizations on their position over the issue of Humanitarian intervention. Individuals who have been engaged in endeavors concerning humanitarian

intervention were also interviewed. The views of intellectuals, NGO workers and diplomats from countries which had in one way or another been or are involved in humanitarian intervention were also sought.

Secondary data included published texts, journals, newspaper, periodicals, magazines and seminar papers. Documents and speeches, statement and pronouncements by United Nations officials; UN records, international conferences were examined. Internet research was also employed.

CHAPTER TWO:

LEGAL AND POLITICAL INSTRUMENTS IN HUMANITARIAN INTERVENTION IN POST COLD WAR ERA CONFLICTS

INTRODUCTION

This chapter attempts to look at some of the legal and political instruments that have been used in justifying humanitarian intervention in post cold war era conflicts.

The chapter appreciates that there is no clear dichotomy between legal and political instruments in humanitarian intervention, as both are inter-twinned and use same conceptual lenses to view the field of humanitarian intervention within the international system. The fact is that most of the armed conflicts we face in post cold war era within the international system are intra and not inter-state, Holzgrefe and Keohane, 2003 observe that of the 56 armed conflicts by the year 2000, 53 of them were internal armed conflict.

WHAT IS HUMANITARIAN INTERVENTION?

Since the issue of humanitarian intervention is related to international law, political science, morality and international relations, one may come across different definitions and categorizations.

Adam Roberts defines humanitarian intervention as a "military or non military intervention in a state, without the approval of its authorities, and with the purpose of preventing widespread suffering or death among the inhabitants".[47] For Tonny Brems Knudsen, humanitarian intervention is "dictatorial or coercive interference in the sphere of jurisdiction of a sovereign state motivated or legitimated by humanitarian concerns".[48] According to Martha Finnemore, humanitarian intervention is a "military or non military intervention with the goal of protecting the lives and welfare of foreign civilians".[49] In the words of Bhikhu Parekh, humanitarian intervention is "an act of intervention in the internal affairs of another country with a view to ending the physical suffering caused by the disintegrations or gross misuse of authority of the state, and helping create conditions in which a viable structure of civil authority can emerge".[50] In a proper legal sense, according to Wil D. Verwey, it is understood "as referring only to coercive action taken by states, at their initiative, and involving the use of armed force, for the purpose of preventing or putting a halt

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[47] Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', International Affairs, Vol. 69, No. 3, July 1993, p. 426.

[48] Tonny Brems Knudsen, 'Humanitarian Intervention Revisited: Post-Cold War Responses to Classical Problems', in Michael Pugh, The UN, Peace and Force, London, Frank Cass, 1997, p. 146.

[49] Martha Finnemore, 'Constructing Norms of Humanitarian Intervention', in Peter Z. Katzenstein (ed.), The Culture of National Security: Norms and Identities in World Politics, New York, Colombia University Press, 1996, p. 154.

[50] Bhikhu Parekh, 'Rethinking Humanitarian Intervention', in Jan Nederveen Pieterse (ed.), World Orders in the Making, London, Macmillan Press Ltd, 1998, p. 147.

to serious and wide-scale violations of fundamental human rights, in particular the right to life, inside the territory of another state".[51]

It is acknowledged that a comprehensive and proactive approach to dealing with grave humanitarian crises is essential. Therefore while some recent international relations literature defines humanitarian intervention as a range of actions including humanitarian assistance and forcible military intervention, many scholars insist on taking an international law approach to defining this, such as that developed by Sean Murphy who defines humanitarian intervention as the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights.

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According to Murphy, the latter phrase is a broad formulation "used to capture the myriad of conditions that might arise where human rights on a large scale are in jeopardy" and includes acts committed by both state and non-state actors.

Looking closely at the above definitions one can see some common or cross-cutting issues chief among them being:

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[51] Wil D. Verwey, 'Humanitarian Intervention in the 1990s and Beyond: An International Law Perspective', in Jan Nederveen Pieterse (ed.), World Orders in the Making, London, Macmillan Press Ltd, 1998, p. 180.

a) Use of military force: although some scholars tend to include non-forcible actions in the definition of humanitarian intervention, the majority tends to exclude them. The main argument for including the military dimension is the facts that, since warring parties mainly cause the violations, their handling needs a military involvement.

b) The absence of the target state's permission: this is the main point, which makes it a humanitarian intervention and distinguishes it from peacekeeping. It is also meaningful in the sense that such an intervention is generally carried out in cases of gross violations caused by the state itself or the state's collapse, in which case there is no potent authority, as in the case of Somalia.

d) Agency of intervention. Though some confine the term to interventions by states on their own (self-help), there is a recent tendency to include interventions under a UN umbrella.

For the purposes of this study, humanitarian intervention may be defined as: Forcible or non forcible action by states to prevent or to end gross violations of human rights in armed conflicts through the use of armed or non armed force without the consent of the target government and with or without UN authorisation.

The concept of military intervention in internal armed conflict in a sovereign state for the express purpose of curbing human rights violations has gained currency in the post cold war era. Beginning with the Gulf War of 1991, where Allied Forces came to the aid of the Kurds in Iraq, and following on with interventions in Somalia, Rwanda and Sierra Leone, the legitimacy of humanitarian intervention in internal armed conflict has been raised high on the agenda of international relations debate.

Kwek, 2001 notes in the period between 1989-2000, the Un Security Council authorized the use of force a total of eleven (11) times as opposed to a mere three (3) between 1945-1988. In ten (10) of these cases, authorizations were given to quell internal conflicts so as relieve internal suffering.

The principle of non-intervention in the domestic jurisdiction or internal affairs of a state is a longstanding and fundamental principle of customary international law. It is the corollary of the right of every state to sovereignty, territorial integrity and political independence, which itself is a fundamental principle of international law.

At the root of considerations concerning humanitarian intervention is the question of how to reconcile in the most constructive way the strained relationship between the non-intervention norm and notably the non-use of force and the international prevention of gross and

systematic human rights violations. A distinction can be made between the legality and the legitimacy of humanitarian intervention.[52]

The question of the legality of humanitarian intervention on the part of states or international organisations is determined by the norms of international law treaty law as well as customary law. The notion of legality attempts to ask is the intervention lawful?

The legitimacy of a given action may be determined mainly on political or moral grounds, but legal considerations could also be involved. The notion of legitimacy attempts to ask is the intervention justifiable? It is a multidisciplinary concept referring to moral-philosophical, political as well as general legal principles. While legality is determined by the norms of international law, legitimacy is an issue of debate in legal doctrine and among international relations scholars and in the general public discourse.

Whether or not an action is considered legitimate can have profound political consequences. The concept of legitimacy is less precise than legality. It will often be contested, and critics will claim that a

[52] Dekker, Ige F. "Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report." *Journal of Conflict and Security Law* Vol. 6 No. 1 (2001): 115-126.

statement about the legitimacy of an act is ultimately nothing but an individual moral and political preference.[53]

Legitimacy is always a matter of degree and assessment, in contrast to legality which is either/or and often according to designated competencies regarding interpretation.

Thus, though the distinction between legal and illegal is clear in principle, there is still some room for nuances and exceptions in international law regarding humanitarian intervention. Legitimacy is in other words a concept with several meanings. It can be a purely moral-political concept, a legal-political concept and even a legal concept, although applied sparingly in the latter context in order not to dilute the rules of law.

LEGAL INSTRUMENTS

In contemporary international law, the UN Charter is the main legal basis for the right of intervention in internal armed conflict by the international community. The UN Security Council plays a prominent role in this matter as it possesses an almost unquestionable competence to determine what constitutes a threat to international peace and security, and by so determining, possesses the capacity to

[53] Donnelly, Jack. "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics." *Journal of International Affairs* Vol. 37 No. 2 (1984): 311-328.

internationalize the status of a particular internal armed conflict. The idea that the principle of state sovereignty is sacrosanct but not absolute is also gaining currency within the international relations debate.

Legal scholars who support the right to intervene in internal armed conflict argue that Article 2(4) of the UN Charter does not contain a general and comprehensive prohibition on the use of force, and that it merely regulates conditions under which force is prohibited. They argue that the Charter allows for exceptions Article 42 and 51 and it therefore open to others. Despite declaratory policies to the contrary, state practice actually supports this view. It is widely accepted that force can be used legitimately to intervene to protect and rescue one's nationals abroad, free people from colonial domination, and to fight terrorism. The protection of people from gross violations of human rights is the newest additional to this list.

State practice during the Cold War does not support the view that a right of humanitarian intervention without Security Council authorisation has been established under customary international law.

The practice of the Security Council since 1991 shows an increasing tendency towards considering inherently internal conflicts threats to international peace and security, notably due to the human suffering

involved. The Security Council, under Chapter VII, has dealt with civil war and humanitarian emergencies notably in the cases of Iraq, the former Yugoslavia, Liberia, Somalia, Haiti, Angola, Rwanda, Burundi, Zaire, Albania, the Central African Republic, Kosovo and East Timor.

The fact that the number of cases has grown dramatically since the beginning of the 1990s is, above all, due to the changed political environment since the end of the Cold War. In the 1990s, China and Russia have often pursued a policy of abstaining instead of vetoing decisions in the Security Council especially in the first half of the 1990s.

The principle of non-intervention has on numerous occasions been reaffirmed by the UN General Assembly, notably in the Declaration on the Inadmissibility of Intervention (1965) and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970).[54] The International Court of Justice has confirmed that the principle is part of customary international law. The customary principle of non-intervention pertains to interstate relations.

As regards intervention by UN organs, a similar principle is set out in Article 2(7) of the UN Charter as a fundamental principle of the organization, observes that;

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[54] United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: 45 – 49.

"Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."[55]

The prohibition on intervention contains two elements. First, the intensity of the intercession must amount to intervention. Second, the intervention must be bearing on matters belonging to the domestic jurisdiction of the state. Intervention according to the customary principle of non-intervention means forcible, dictatorial or otherwise coercive interference, in effect depriving the state intervened against of control over the matter.[56] Other forms of interference in the affairs of another state do not constitute intervention in the legal sense. The threat or use of force is the classical form of intervention whether in the direct form of military action or in the indirect form of support for subversive or terrorist armed activities in another state.

In the Nicaragua Case, the International Court of Justice held that the supply of funds by the United States to violent opposition forces in Nicaragua, while not a threat or use of force, constituted intervention

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[55] United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: 68 – 71.

[56] M. Gene Lyons and Michael Mastanduno (eds.). Beyond Westphalia?: State Sovereignty and International Intervention, Baltimore, Johns Hopkins University Press, 1995.

in the internal affairs of Nicaragua.[57] According to legal scholars, the basic principle that was reaffirmed was the imperative of refraining from any act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.

The General Assembly in 1970 adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States. Although, formally, the declaration has only the status of a recommendation, it is generally recognised that it reflects to a large extent the content of the principle of non-intervention in contemporary customary international law. The declaration states:

"No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also no state shall organise, assist, foment, finance, incite or tolerate subversive, terrorists

[57] Abiew, Francis Kofi. The Evolution of the Doctrine and Practice of Humanitarian Intervention. The Hague: Kluwer Law International, 1999 38.

or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State." [58]

Areas traditionally reserved for domestic jurisdiction (*domainre servé*) include the constitutional order and the political, economic, social and cultural system. The General Assembly in its Declaration on Friendly Relations from 1970 stated that, "*Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."*[59] The International Court of Justice has confirmed this view, stating that, "*A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely [including notably] the choice of a political, economic, social and cultural system, and the formulation of foreign policy."*[60]

However, the notion of domestic jurisdiction is not absolute but essentially relative, as it depends on the development of international law. States may by way of treaty undertake international obligations on any subject. Therefore, no area is by definition reserved for the exclusive domestic jurisdiction of the state.

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58 United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: 111 – 115.

59 United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: PP 143 – 144

60 Abiew, Francis Kofi. The Evolution of the Doctrine and Practice of Humanitarian Intervention. The Hague: Kluwer Law International, 1999 PP 55.

From a legal perspective there is a clear trend towards a changed scope of state sovereignty with regard to the way a state treats individuals and minorities within the state. Since 1945 the principle of international protection of human rights has progressively gained weight at the cost of the classical, highly prohibitive interpretation of state sovereignty.

This development has been brought about, above all, by the adoption of international conventions for the protection of human rights. To the extent that a state has ratified these documents on human rights and humanitarian law, such issues no longer belong to the exclusive domain of this state. Still, it is a major problem that many states have made reservations to these documents.

The tendency is towards increasingly considering the individual, and not only the state, as a fundamental subject of international relations, and towards regarding the security and basic rights of individuals within the state, and not merely the absence of military conflict between states, as essential to the creation of stability and peace in the world.

The UN Charter reflects this idea on the basis that maintenance of order and pursuit of justice can be reconciled on the domestic level within states as well as on the global level. Before 1945, the protection

of human rights was predominantly a matter of domestic jurisdiction. However, the UN Charter in Article 1(3) sets out as a purpose of the UN to achieve international co-operation through promoting and encouraging respect for human rights and fundamental freedoms. Article 55 provides that the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms, and according to Article 56 all members of the UN pledge themselves to take joint and separate action for the achievement of the protection of human rights.[61]

In pursuance of the objectives of the Charter numerous declarations and conventions on fundamental human rights and international humanitarian law have been adopted. Most of the basic conventions – as shown below – have been ratified by a vast majority of states in the world. Landmark UN documents on human rights and fundamental freedoms include and not limited to:

a) The Universal Declaration of Human Rights (1948)

b) The Convention for the Prevention and Punishment of the Crime of Genocide (1965)

c) The Convention on the Elimination of all Forms of Racial Discrimination (1965)

[61] United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: PP 210 – 214.

d) The International Covenant on Civil and Political Rights (1966)

e) The International Covenant on Economic, Social and Cultural Rights(1966)

f) The Convention on the Elimination of All Forms of Discrimination against Women (1979)

g) The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

h) The Convention on the Rights of the Child (1989)

The fundamental documents on international humanitarian law are the four Geneva Conventions from 1949, with Additional Protocols I and II of 1977 (the four Geneva Conventions are in force since 1950, the Additional Protocols I and II since 1979 and 1978 respectively).

The primary objective of international humanitarian law is similar to that of international human rights law, to protect the life and integrity of the individual. But whereas human rights law has general applicability, the rules of international humanitarian law apply only to armed conflict both international and internal.

Even if the state is not a party to the relevant conventions on human rights or international humanitarian law the principle of non-intervention may still be applicable because the treaty provisions codify or have subsequently developed into norms of customary international law, which are binding upon all states.

The International Court of Justice in 1970 held that the obligations of states towards the international community as a whole include the protection of the individual against the crime of genocide as well as the protection of the principles and rules concerning the basic rights of the human person[62] some of which have entered into the body of general international law, others are conferred by international instruments of a universal or quasi-universal character.

The protection of these basic rights are the concern of all states, in view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations ***erga omnes***..[63] In 1986, the International Court of Justice confirmed that the basic provisions of the Geneva Conventions on international humanitarian law on the protection of people *hors de combat* are norms of customary international law, binding upon all states. According to the Court, these basic principles of international

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[62] Abiew, Francis Kofi. The Evolution of the Doctrine and Practice of Humanitarian Intervention. The Hague: Kluwer Law International, 1999 PP 92.

[63] Ibid, p 113.

humanitarian law belong to the elementary considerations of humanity.

So far, no state has succeeded in invoking Article 2(7) against UN involvement in issues of human rights on the basis that the matter essentially belonged to the domestic jurisdiction of the state.

The strongest universal testimony to the international development in the field of human rights was adopted by the World Conference on Human Rights in Vienna on 25 June 1993. In the concluding document the Vienna Declaration and Programme of Action which was unanimously adopted by all the members of the UN, it is unequivocally stated in paragraph four that, "*the promotion and protection of all human rights is a legitimate concern of the international community.*"[64]

The protection of the individual in international law is not restricted to obligations of states to observe and protect human rights. As regards atrocities against humanity there is individual criminal responsibility under international law. With the coming into function of the International Criminal Court, there will also be international jurisdiction to prosecute.

[64] United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: PP 203.

The agreement on the 1998 UN Conference in Rome to establish a permanent International Criminal Court under the auspices of the UN signifies the culmination so far of the development described.[65] The jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole, which is the crime of genocide, crimes against humanity and war crimes as outlined in Article 5 of the Statute. Persons responsible for such crimes are subject to the jurisdiction of the Court whether they acted in a private or an official capacity as stipulated in Article 25 and 27 of the Statute. The jurisdiction of the Court is complementary to that of the state and thus only exists in so far as the state is unwilling or unable to prosecute.

POLITICAL INSTRUMENTS

Even economic sanctions or political measures may in some cases amount to intervention, provided they have coercive effect.

However, many forms of interference by one state in the affairs of another state do not amount to intervention and are therefore in any case lawful, whether or not they bear on matters of domestic jurisdiction. Criticism directed against another state is not intervention, although the state criticised may often claim that it is.

[65] United Nations: History, Principles, Practice and Challenges, London: Routledge, 1993: 128.

Even diplomatic and economic sanctions are not intervention proper; such sanctions may well be undertaken to bring pressure to bear on the target state, but such measures are not intervention, since, they do not have coercive effect.

In the Nicaragua Case, the International Court of Justice refused the assertion by Nicaragua that the United States boycott on trade with and freeze of economic aid to Nicaragua constituted intervention.[66] In recent years, the EU has adopted embargos on the sale of weapons to Burma, Nigeria and Sudan. Similarly, African states in 1996 adopted sanctions against Burundi and Liberia.

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Significantly, states may also provide humanitarian emergency assistance (food, clothes, medical care etc.) to civilians within another state without the consent of its government. According to the International Court of Justice, such assistance does not violate the prohibition on intervention, provided it is limited to the purposes allowed by the International Red Cross and is offered to all in need without discrimination.[67] Humanitarian emergency assistance provided by non-governmental organisations is, by definition, not intervention, since only acts attributable to states or governmental organisations may violate the customary principle of non-intervention.

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[66], Abiew, Francis Kofi. The Evolution of the Doctrine and Practice of Humanitarian Intervention. The Hague: Kluwer Law International, 1999 PP 161.

[67] Ibid PP 190.

The delimitation of the domestic jurisdiction of a state is particularly relevant to the competence of the UN. As noted above, regardless of whether or not a matter is within the domestic jurisdiction of a state, other states may interfere in many ways which do not amount to intervention.[68] In fact, most non-military sanctions undertaken by states are not intervention.

State sovereignty is still a cornerstone of the international legal and political order, but to a growing degree the classical perception of sovereignty is challenged by the norm that the legitimacy of the exercise of the rights of sovereignty is dependent on respect for human rights and for the principle of representation.[69] This is not an abrupt change from sovereignty to something else. The principle of sovereignty has throughout its history been continuously re-defined and modified. Although the form has been constant, the content has changed; what are the issues that a state can decide on its own and what matters do not fall under the jurisdiction of the national sovereign?

The scope of sovereignty after the Cold War has gradually been reduced due to international norms and requirements of democracy, human rights, and minority rights. Thereby the freedom of

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[68] Damrosch, Lori Fisler, ed. *Enforcing Restraint: Collective Intervention in Internal Conflicts*. New York: Council on Foreign Relations Press, 1993. p. 77.

[69] Nigel S. Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework', in Rodley (ed.), To Loose the Bands of Wickedness, London, Brassey's Ltd, 1992. p. 47.

governments to do what they want behind their shield of sovereignty has been called into question.[70] This has reduced the degree to which rulers can use coercion to consolidate political order on their territory without some form of international reaction. At the same time, failed states in which political and social order has collapsed are only in few cases allowed to disappear as judicial entities because of the international community's reluctance to accept territorial conquest and formal hierarchies such as trusteeships and protectorates.

Furthermore, the practice of the UN organs and of states shows that, increasingly, the protection of fundamental human rights in general is considered a legitimate concern of the international community, regardless of specific legal obligation.

A few developing countries are still in reality opposed to the view that protection of human rights is a matter of legitimate international concern. Attaching, also for historical reasons, high value to the principle of state sovereignty, these countries maintain that the protection of the individual is a matter essentially within the domestic jurisdiction of the state.[71]

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[70] John Charvet, 'The Idea of State Sovereignty and the Right of Humanitarian Intervention', International Political Science Review, Vol. 18, No. 1, 1997.

[71] C. Clapman, Africa and the International System, Cambridge, Cambridge University Press, 1996,p 16.

Sometimes the old natural law doctrine of a just war (*bellum justum*) for the sake of humanity is invoked to justify humanitarian intervention on moral grounds. According this argument, the rights of states recognised by international law are derived from human rights, and as a consequence war on behalf of human rights (humanitarian intervention) is morally justified in appropriate cases.[72]

According to this line of reasoning, the validity of humanitarian intervention is not based upon the nation-state oriented theories of international law rather it is based upon an equally vigorous principles of the kinship and minimum reciprocal responsibilities of all humanity, the inabilities of geographical borders to stem categorical imperatives, and ultimately, the confirmation of the sanctity of human life.

Arguably, in cases of extreme human suffering it is necessary to undertake humanitarian intervention even without Security Council authorisation in order to preserve the legitimacy of international legal order. According to this argument If international law, at the present stage of its development and taking into account the present level of functional incapabilities of the UN system, were to provide no room for genuinely selfless, morally-dictated last-resort humanitarian intervention in extreme cases where the Security Council is unable to

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[72] Kenneth R. Himes, 'The Morality of Humanitarian Intervention', Theological Studies, Vol. 5, Issue 1, March 1994; P 121.

act timely and effectively, it might lose control over, or even become irrelevant to the solution of, some of the greatest human dramas in the world.[73] In such cases, prohibiting intervention by individual states might become so utterly immoral as to undermine the basic fundamentals, if not the very idea of law.

Connected with the above argument is the argument that humanitarian intervention in extreme cases may be regarded as a legitimate breach of international law in order to prevent or bring to an end even more serious breaches of international law.[74] This argument of necessity is supported by the increasing concern for the protection of the life and dignity of the individual in international law and international relations, although, as has been shown, it does not provide a legal defence under existing international law.

The core of sovereignty is the territorial integrity and political independence of the state. Humanitarian intervention has a limited, strictly humanitarian purpose, and thus, although clearly encroaching upon, does not strike at the heart of state sovereignty.[75]

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[73] Barry, Benjamin. "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities." Fordham International Law Journal Vol. 16 No. 2 (1991): p. 52.

[74] Ibid, p 57.

[75] Ayoob, Mohammed. "Humanitarian Intervention and State Sovereignty." International Journal of Human Rights Vol. 6 No. 1 (2002): p. 66.

Absence of humanitarian intervention in the face of genocide and other gross and systematic violations of human rights is not only unjust but is also likely to encourage coercive methods of weak state regimes in their dealing with separatist groups and alienated ethnic and religious communities.[76] By conducting humanitarian interventions where possible, the incentives to weak state regimes to observe human rights and seek peaceful solutions to internal problems will increase. Observance of human rights is a likely precondition for internal stability in weak states and for long-term global political order.

The existence of an automatic and absolute coupling of humanitarian intervention to authorisation by the Security Council might be misused by calculating lawbreakers and by members of the Security Council leading to paralysis of the UN security system. For that reason, there might be situations where the only way to deter authoritarian rulers or to address an emerging genocide is to act without authorisation from the Security Council in order to restore justice and avoid a significant reduction of the international community's ability to enforce international law.[77]

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[76] Barry, Benjamin. "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities." Fordham International Law Journal Vol. 16 No. 2 (1991): p. 72.

[77] Arias, Inociencio F. "Humanitarian Intervention: Could the Security Council Kill the United Nations?" Fordham International Law Journal Vol. 23 No. 4 (2000). P. 91.

If a group of democratic states can agree to set standards for the conduct of governments within their region higher than those set by global regimes, military enforcement of these standards should not be conditional on authorisation from the Security Council.[78] In that case progressive development of democracy and protection of groups and individuals on regional levels would in effect be hindered by the lowest possible common denominator on the global level.

On the one hand it can be argued that order is a pre requisite for justice. At the domestic level, without some degree of political order and authority within states chaos and civil war might be the result. In that case protection of rights of individuals and minorities will be difficult to achieve. At the international level, without predictability in the relations between states facilitated by the principle of non-intervention and some degree of co-operation between the great powers, a climate of competition and international instability might ensue.[79] In such an international environment states will tend to be more concerned about their national security and this is likely to constrain the international community's ability to take action in the case of massive violations of individual rights due to fear of further undermining international order.

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[78] Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', International Affairs, Vol. 69, No. 3, July 1993. P 86.

[79] Roy Isbister, 'Humanitarian Intervention: Ethical Endeavours and the Politics of Interest', Briefing on Humanitarian Intervention, No. 1, The International Security Information Service (UK), May 2000,

On the other hand it can be argued that justice is a precondition for order at the national level. Without legitimacy based on individual rights, consensus on political rules of the game, and general acceptance of the definition of the community over which the governance is exercised, domestic orders are not only authoritarian and unjust but also fragile and vulnerable to breakdown. At the international level, if traditional norms of sovereignty and non-intervention are not overruled by the international community when governments violate these principles on a massive scale, neither justice for the greatest number nor long-term domestic and international order will be secured, because oppressed groups and individuals will inevitably revolt against their rulers and internal conflict will spill over into international conflict.[80]

According to this argument, domestic and international orders derive their legitimacy and stability from their ability to protect individuals and groups from arbitrary coercion and violence.

Both approaches acknowledge that the main challenge is to protect the individuals from the extremes of power; either from too little which is anarchy or too much which is tyranny. The difference is not necessarily that some value order, and others value justice, but rather

[80] Crocker, Chester A., Fen Osler Hampson and Pamela R. Aall, eds. *Managing Global Chaos: Sources of and Responses to International Conflict.* Washington, DC: United States Institute of Peace, 1996.

that the one side emphasises order as the precondition for justice, while the other stresses justice as the road to long-term order.

In a concrete situation, one may often be forced to make trade-offs. At least in the short term, one will have to forego gains in justice, protecting individuals in order to defend order or to accept a weakening of international order for the purpose of defending human rights.

Arguments in favour of intervention in the absence of great power consensus and UN mandates are often based on a view of the Security Council as blocked due to vetoes.[81] Opponents argue that the Security Council has experienced its best period ever since the end of the Cold War. Much has been achieved, and there are real prospects of gradually improving the operation of the Security Council through informal limitations on the use of the veto.

On the other hand, by sharpening the rhetoric about universal protection of rights of individuals and groups and by conducting humanitarian interventions, the incentives of weak state regimes to observe human rights and seek conciliation with aggrieved sections of their populations will increase.

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[81] Popovski, Vesselin. "UN Security Council: Rethinking Humanitarian Intervention and the Veto." *Security Dialogue* Vol. 31 No. 2 (2000): 249-252.

As interventions in Somalia, Rwanda, Bosnia, Kosovo, and East Timor have illustrated, the protracted nature of intra state wars tends to produce situations in which employment of instruments like diplomatic mediation and peacekeeping escalates into peace enforcement operations.[82] More often than not, it is difficult to preserve the credibility of the international community's engagement in addressing humanitarian disasters without resorting to military enforcement activities because half-hearted and timorous intervention achieves little.

Due to this escalation logic, the basic choice in many cases is one between either strict non-involvement or comprehensive military intervention. Yet a foreign policy course of hard-headed inaction is difficult to maintain in democracies when a humanitarian crisis has reached the political agenda and triggered demands for 'doing something'.[83]

[82] Manwaring, Max G. and John T. Fishel, eds. *Toward Responsibility in the New World Disorder: Challenges and Lessons of Peace Operations*. London. 2001. P 16-18.

[83] John Roper, 'The Foreign Policy of Western Countries: The Problem of Intervention', in Roger Williamson (ed.), Some Corner of a Foreign Field, London, Macmillan Press Ltd. 1998. P 73.

CHAPTER THREE:

LEGAL AND POLITICAL CONSTRAINS TO HUMANITARIAN INTERVENTION IN POST COLD WAR ERA CONFLICTS

INTRODUCTION

This chapter attempts to outline some of the legal and political constrains to humanitarian intervention in post cold war era conflicts and the arguments therein.

The chapter appreciates absence of a clear dichotomy between legal and political instruments that constrain humanitarian intervention, as both legal and political constrains are inter-twinned and see the field of humanitarian intervention from the same conceptual lenses.

There are also strong political and legal-political arguments against humanitarian intervention in general and intervention without Security Council authorisation in particular, especially concerning the consequences for the international legal and political order and the risk of abuse.

LEGAL CONSTRAINS

Opponents to humanitarian intervention in post cold war era conflicts point out that it is simply illegal according to the UN Charter, the

primary legal document that governs international relations. Most States and legal scholars agree that the UN Charter spells out general prohibition on the use of force. Nowhere in the Charter are humanitarian grounds set out as legitimate grounds for military interventions. The sole legitimate cause for the use of military force is as a response to international aggression.

Some scholars in the field of humanitarian intervention in internal armed conflict choose to avoid legal hair splitting over the issue of whether human rights constitutes a just cause for intervention, and instead appeal to the long established and widely accepted the norm of state sovereignty. The UN Charter Article 2(7) summarizes the status quo character of the international law as it prohibits even the UN from intervening in matters that are essentially within the domestic jurisdiction of ant state. Intervention in a sovereign state fro humanitarian purpose, they argue attempts to impose a pseudo-universalistic conception of human rights on weaker states and can be used to mask other self interested motives.

The prohibition on the use of force under existing international law is a general rule with relatively well-defined exceptions. Admitting humanitarian intervention in derogation of Article 2(4) may in time lead to a demand for other exceptions as well, thus leaving the prohibition much more blurred and modified than at present, thereby

weakening its normative strength and, possibly, also its general recognition in the international community.[84]

The right of veto of the permanent members of the Security Council is a legal recognition that use of force for purposes other than self-defence must rest on a great power consensus. The assumption behind the veto is that dividing the great powers (or even risking that division) might upset the global political order and undermine the possibility of a global legal order.[85] While it might be tempting to contemplate ways of protecting regional or global enforcement of human rights from the vagaries of the great powers, it should be taken into consideration that the continued status of the Security Council as the sole centre for authoritative decision-making on the use of force for humanitarian purposes might be a precondition for global political and legal order.

Critics of humanitarian intervention without Security Council authorisation maintain that it is a mistake to violate the principle of non-intervention without first securing a mandate from the Security Council. To bypass the Security Council in order to avoid a veto would be to violate the constitution of international society at its most

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84 Barry, Benjamin. "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities." Fordham International Law Journal Vol. 16 No. 2 (1991):

85 Zolo, Danilo. *Invoking Humanity: War, Law and Global Order.* London: Continuum, 2002. p. 81.

important point.[86] Endangering the principle that rules out use of force for purposes other than self-defence might produce more unpredictability and a higher level of tension in international affairs.

POLITICAL CONSTRAINS

Humanitarian intervention may blur the contours of the hard - earned but now generally recognised international prohibition on the use of force, put the fragile collective security system at risk and undermine basic tenets of the present international legal order.[87] Sidestepping the Security Council and endangering the relationship between the great powers for the sake of human rights enforcement might produce consequences for the whole world far worse than inaction in the face of humanitarian disaster.[88] The intervening powers could end up sacrificing too much for too little.

If the policy of states in general were that the authorisation of Security Council is a preferable, but not necessary, basis for humanitarian intervention, this would in time undermine the role of the Security

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[86] Popovski, Vesselin. "UN Security Council: Rethinking Humanitarian Intervention and the Veto." *Security Dialogue* Vol. 31 No. 2 (2000): 249-252.

[87] Scheffer, David J., Richard N. Gardner and Gerald B. Helman. *Post-Gulf War Challenges to the UN Collective Security System: Three Views on the Issue of Humanitarian Intervention*. Washington, DC: United States Institute of Peace, 1992. p. 48.

[88] Ibid, p. 88.

Council as the sole centre in the world for authoritative decision-making on the use of force for humanitarian purposes.[89]

By increasing the frequency of humanitarian intervention and sharpening the rhetoric about absolute rights for individuals and groups that overrule traditional notions of sovereignty there is a risk of altering the calculations of and encouraging rebellion among minorities and other groups who are targets of government oppression. As the willingness and ability to intervene in trouble spots with no strategic importance and no media attention is limited this might produce a discrepancy between the expectations among these groups and the capabilities of the international community to intervene if things go wrong. If the result is disintegration of fragile, weak states and humanitarian disasters, which do not trigger humanitarian intervention, justice for the greatest number is unlikely to result. Hence, by creating inflated expectations, the international community might inflict more suffering instead of bringing relief to civilians caught up in internal wars.

While the pursuit of universal norms pertaining to democracy, human rights, and minority protection and the concomitant decrease in the

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[89] Lillich, Richard B. "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World." Tulane Journal of International and Comparative Law Vol. 3 No. 1 (1995): p. 101.

scope of sovereignty in a region is a valuable goal, military enforcement without UN mandates of such norms on intransigent governments is not without problems. It might signal a return to an era of geographical morality in which certain regions of the world define their own threshold for the use of armed force in their region without UN authorization.[90] Such regionally defined standards of civilizations could also resurrect earlier doctrines of the right of intervention of powerful states in their own neighborhoods when diplomatic instruments prove unsuccessful.

Most likely, humanitarian intervention will be applied in the future, as in the past, by powerful states against weak states, notably third world states. Thus, humanitarian intervention may be seen as adding to the already existing inequality in the international community, thereby further undermining the principle of equality of states on which is stipulated in the UN Charter, Article 2(1). This poses a problem of political legitimacy of humanitarian intervention in international relations.[91] Allowing for intervention without Security Council authorisation increases the inherent risk of abuse for political purposes, which then means powerful states intervening in an illegitimate way in weak states.

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[90] Richard Connaughton, 'Military Intervention and UN Peacekeeping', Rodley 1992, p. 68.

[91] Dekker, Ige F. "Illegality and Legitimacy of Humanitarian Intervention: Synopsis of and Comments on a Dutch Report." *Journal of Conflict and Security Law* Vol. 6 No. 1 (2001): 115-126.

At the international level, without predictability in the relations between states facilitated by the principle of non-intervention and some degree of co-operation between the great powers, a climate of competition and international instability might ensue.[92] In such an international environment states will tend to be more concerned about their national security and this is likely to constrain the international community's ability to take action in the case of massive violations of individual rights due to fear of further undermining international order.

According to this line of reasoning maintenance of order is considered a moral and political imperative because domestic and international stability is a precondition for the pursuit and enforcement of other values such as human rights, minority rights, and democracy.

Proponents of humanitarian intervention conducted without Security Council mandates in extreme cases maintain that the UN security system is of little value if it precludes action in the face of massive violations of human rights and genocide. Proponents of this line of thinking emphasise that some of those who maintain that the UN has primary responsibility for the maintenance of international peace and security and oppose any use of force not authorised by the Security

[92] Roy Isbister, 'Humanitarian Intervention: Ethical Endeavours and the Politics of Interest', Briefing on Humanitarian Intervention, No. 1, The International Security Information Service (UK), May 2000,

Council do so precisely in order to preclude enforcement of individual rights at the expense of sovereignty.

Humanitarian intervention without consent of all the great powers have invoked the closely related language of prudence and international order. Proponents of this line of thinking have argued that conducting a humanitarian intervention against the will of one or more great powers would be to gamble with international order which could produce consequences for the whole international system far worse than a humanitarian disaster in a single state.[93] The premise of this argument is an ethic of responsibility not to split the great powers into antagonistic camps if it can be avoided.

Proponents hold that appeasing some of the great powers' concern about the decreasing scope of sovereignty would preclude the progressive development of human rights, minority rights, and humanitarian law and would, in effect, preserve the principle of sovereignty as a shield behind which rulers can do as they please. The basic premise of this argument is that an international order that allows for genocide and other flagrant violations of human rights is morally flawed and inherently unstable.

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[93] Damrosch, Lori Fisler and David J. Scheffer, eds. *Law and Force in the New International Order*. Boulder: Westview, 1991. P 63

It has been argued that military intervention in civil wars between oppressed minorities and central governments as well as sharp rhetoric about the universal protection of minorities involves a risk of changing the calculations of leaders of minority groups and encouraging armed resistance against government coercion.[94] The pro - intervention discourse maintains that inaction in the face of genocide is not only unjust but is also likely to encourage coercive methods of weak state regimes in their dealing with separatist groups and alienated ethnic and religious communities.

It has also been argued that while low regional thresholds in the face of flagrant violations of individual rights may be a valuable goal, unauthorised military enforcement of universal principles could be dangerous.[95] According to this line of reasoning, there is a danger of such interventions undermining the imperfect, yet resilient, security system created after World War II, and of setting dangerous precedents for future interventions without clear criteria to decide who might invoke these precedents and in what circumstances.

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[94] Chantal de Jonge Oudraat, 'Intervention in Internal Conflicts: Legal and Political Conundrums', Carnegie Endowment for International Peace Working Paper 15, August 2000.

[95] Levitt, Jeremy. "Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone." *Temple International and Comparative Law Journal* Vol. 12 No. 2 (1998): 333-375.

Demands for military enforcement action in humanitarian emergencies have on several occasions been at odds with the general unwillingness of intervening powers to accept risk to the lives of their soldiers e.g when the US withdrew its soldiers from the UN mandated operation in Somalia when the circumstances changed and the military risks increased and reluctance and unwillingness of several leading NATO powers to intervene in Kosovo with ground troops.[96] Countries that champion humanitarian values are at the same time, and for understandable reasons, reluctant to risk the lives of their soldiers to defend human rights, even when the humanitarian disaster takes place in geographic proximity.

Western powers have been reluctant to conduct humanitarian interventions in complex civil wars. This reluctance tends to increase if the crises take place in geographic areas with little strategic value and are unable to attract persistent media attention.

For this reason, it is often easier for governments geographically close to a conflict to commit the political capital, personnel, and money necessary for military interventions. The Australian-led coalition of the willing in East Timor is a case in point. But most regions do not have sufficient capabilities and security organizations with the capacity to

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[96] Farrell, Theo. "Sliding into War: The Somalia Imbroglio and U.S. Army Peace Operations Doctrine." *International Peacekeeping* Vol. 2 No. 2 (1995): 194-214.

carry out major peacekeeping or peace enforcement operations.[97] The ability of OAU to alleviate crisis in Somalia and Rwanda was limited as was the role of ASEAN and APEC in the East Timor crisis.

Moreover, regions are very uneven when it comes to the maturity of interstate relations. In regions characterised by weak states, civil wars and lack of shared norms and values, high levels of mutual suspicion and uncertainty limit the credibility of regional organisations.[98] Thus, while states closest to a conflict might be most motivated to intervene, they are also often too involved to be expected to perform the task in an acceptable way.

These factors have inhibited the ability of the international community to respond to genocide and humanitarian disasters with credible diplomatic instruments and efficient and sustainable military force.[99] The effectiveness of the international community has also been constrained by the absence of substantial agreement within the Security Council and among the broader UN membership about what constitutes a threat to international peace and security and to what degree the principle of non-intervention in the domestic jurisdiction of

[97] Ladnier, Jason. *Neighbors on Alert: Regional Views on Humanitarian Intervention: Summary Report of The Regional Responses to Internal War Program.* Washington, DC: Fund for Peace, 2003: p 99 -108.

[98] Ibid, p 116 - 121.

[99] Daniel, Donald C.F. and Bradd C. Hayes. *Securing Observance of UN Mandates through the Employment of Military Forces.* Newport: U.S. Naval War College, 1995. P 37.

a sovereign state can be overruled in the case of gross human rights violations and genocide.

CHAPTER FOUR:

CRITICAL ANALYSIS OF HUMANITARIAN INTERVENTION IN POST COLD WAR ERA CONFLICTS

While there is a general agreement within the international community that the community of nations should not stand by in the face of massive violations of human rights, respect for the sovereign rights of states retains a central place among the ordering principles of international community. There are emerging calls urging the states to develop criteria that would permit humanitarian interventions in post cold war conflicts (which are mostly internal conflicts) in the absence of a consensus in the UN Security Council.

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However a lack of common ground in the debate indicates that despite the consensus that genocide and mass violation of human rights are unacceptable, and that economic sanctions and the threat of criminal prosecution are weak deterrents, few states are willing to legitimize solutions imposed by external forces. For they feel that to do so would be to weaken the concept of state sovereignty that thus far under-girded the international system. State sovereignty and human rights remain the opposing horns of the dilemma over humanitarian interventions in internal armed conflict.

In spite of more permissive global circumstances the effectiveness of the UN security system in the face of gross and systematic violations

of individual rights has been limited on several occasions. Differences within the Council reflect the lack of consensus in the wider international community over how to achieve a proper balance between sovereignty and human rights.

Failure to intervene in the face of humanitarian disasters, however, has also been driven by a general disinclination of Security Council members to embark upon ventures that appear unclear and risk becoming so lengthy and costly in terms of human life and money that they are unlikely to find domestic political support. Such considerations appeared to prevail when the Security Council initially hesitated to act in the face of an unfolding genocide in Rwanda.

However, the protection of human rights has become an issue of legitimate international concern, and therefore no longer falls within the exclusive domestic jurisdiction of the state. This especially holds true as regards gross and massive violations of human rights or international humanitarian law. The basic norms for the protection of the individual are binding upon all states whether by explicit treaty obligation or because they are part of international customary law as universal standards of humanity in accordance with the principles of the UN Charter. This has been confirmed by the International Court of Justice.

The practice of the UN and of states even supports the view that, in general, the protection of human rights is a matter of legitimate international concern, and, therefore not protected by the prohibition on intervention in the domestic jurisdiction of a state. The legitimate international concern for the most serious and systematic human rights violations exists whether the violations are committed by state authorities or by guerrillas, militias or other private bodies or individuals acting within the territory of the state. This is reflected in the recognition of individual criminal responsibility under international law for the most serious crimes against humanity.

With the Nuremberg and Tokyo trials as a starting point, this development has reached its climax so far with the decision to establish a permanent International Criminal Court. The protection of the basic rights of individuals has become a shared responsibility of the state and the international community. The primary responsibility under international law to observe, protect and punish crimes against the basic rights of the individual still rests with the state. The international responsibility is complementary and comes into play in cases where the state is unwilling or unable to fulfill these obligations.

Often, the controversy around a possible humanitarian intervention will express itself in terms of a conflict between concerns for order and justice. What is most important, to preserve stability and law

internationally or to act to protect suffering or threatened individuals in a conflict? In concrete situations, order and justice are therefore often perceived as antagonistic concepts.[100] The relationship is so complex because it is neither a simple opposition, nor a question that can be solved or defined away. A tension remains, even if the two can often be reconciled.

After 1945, numerous cases exist in which a state has intervened by the use of force in another state. Most of these interventions, however, could not reasonably be said to be genuinely humanitarian. The political interest of the intervening state or its interest to protect its own nationals abroad in most cases seems to have been the basis for intervention. More importantly, even in cases where the doctrine of humanitarian intervention might have been invoked, states most often have not. States intervening have most often relied on self-defense as their legal justification. Many of these cases concerned intervention by a state to protect its own nationals abroad. In other cases, states have relied upon an (alleged) invitation by the government. Arguable humanitarian interventions include the following cases:

In 1979, France intervened in Central Africa to put an end to the atrocities committed by President Bokassa, notably a veritable

[100] Hampson, Fen Osler. Madness in the Multitude: Human Security and World Disorder. Oxford: Oxford University Press, 2001. P 41.

massacre on students. While Bokassa was abroad, France intervened without meeting any resistance and reinstated the ousted President Dacko. Only a few states criticised the French intervention.

In 1979, Tanzania intervened in Uganda and conquered the Ugandan capital Kampala forcing Idi Amin to escape. Tanzania installed a new government. The background to the intervention was partly a conflict concerning Kagera a region of Tanzania annexed by Amin, partly the reign of terror conducted by Amin resulting in the loss of estimated 300.000 lives. Only a few states criticised the intervention.

But the practice of the Security Council in the 1990s also evidences a tendency towards further widening the notion of a threat to the peace. The Security Council now considers that internal conflicts with humanitarian consequences may be regarded as threats to international peace in their own right, regardless of their international repercussions. The Security Council has considered that serious violations of human rights, international humanitarian law and even democracy may in themselves constitute a threat to international peace. Security Council authorisation for humanitarian intervention is an innovation of the 1990s as well.

In the case of Iraq (1991), the Security Council determined that the Iraqi repression against the Kurds and the ensuing cross-border

repercussions were a threat to international peace and insisted upon free access by humanitarian organisations.

In the aftermath of the Gulf War, Iraq initiated a campaign of repression against the Kurds in the northern part of Iraq, resulting in serious humanitarian suffering and substantial refugee flows into Turkey and Iran as well as cross - border incursions. The Security Council, in Resolution 688 (1991), condemned the Iraqi repression, *the* consequences of which threaten international peace and security in the region. Although the Council referred also to cross-border consequences, the Resolution was clearly motivated by the magnitude of the human suffering. The Council insisted that Iraq allow immediate access by international humanitarian organisations. Resolution 688 may be regarded as a fore runner to authorisations for humanitarian intervention in subsequent cases. Immediately after the adoption of Resolution 688 a number of states undertook humanitarian relief operations in Northern Iraq backed by force.

Many states participating referred to Resolution 688 read in conjunction with Resolution 678 authorising the use of force against Iraq following the Iraqi intervention in Kuwait – as the legal basis for the operation. According to the dominant view in international legal doctrine, the use of force for humanitarian purposes in Iraq since 1991 is an example of humanitarian intervention without authorisation from the Security Council, although the operations in

Iraq were deeply embedded in and arguably politically legitimised by the overall involvement of the Security Council.

In the case of the former Yugoslavia (1991-93) the Security Council considered civil war and serious violations of international humanitarian law a threat to international peace and, for the first time ever, authorised a humanitarian intervention. It also established an international tribunal for the prosecution of war criminals. The Security Council, in Resolution 757 (1992), determined that the situation, notably in Bosnia, constituted a threat to international peace and security and under Chapter VII imposed comprehensive economic sanctions against Serbia and Montenegro.

In Resolution 770 (1992), the Security Council called upon States to take nationally or through regional agencies all measures necessary to facilitate the delivery of humanitarian assistance to Bosnia-Herzegovina. This was, in reality, an authorisation to NATO, which did not however intervene in a substantial way until more than two years later, when NATO attacked the Bosnian Serbs and forced them to surrender. By Resolution 827 (1993) the Security Council, under Chapter VII, established an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia. Thereby, it had stated for the first time that grave

breaches of international humanitarian law constitute, in themselves, a threat to international peace and security.

In the case of Somalia (1992), the Security Council considered the humanitarian tragedy resulting from civil war and anarchy a threat to international peace and security and ultimately authorised a military intervention for humanitarian purposes. In Resolution 733 (1992), the Security Council expressed alarm at the deteriorating civil war in Somalia resulting in heavy loss of human life. Concerned that the continuation of this situation was a threat to international peace and security, it imposed, under Chapter VII, an arms embargo against Somalia. In landmark Resolution 794 (1992), the Security Council took its boldest stand so far when determining without reference to cross frontier implications that the humanitarian disaster in Somalia brought about by civil war, disorder and widespread violations of international humanitarian law in itself constituted a threat to international peace. Acting under Chapter VII, the Security Council authorised the Member States and the Secretary-General to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia in accordance with the US offer to head such an operation.16 The ambition was to restore peace, stability and law and order in Somalia. In this respect, the humanitarian intervention did not succeed, and the efforts were interrupted in 1995.

In the case of Rwanda in 1994, the Security Council considered the humanitarian tragedy resulting from civil war, genocide and flagrant violations of international humanitarian law and human rights a threat to international peace and security and authorised a humanitarian intervention. Like in the former Yugoslavia, the Council also established an international tribunal for the prosecution of war criminals. In the spring of 1994, a civil war developed in Rwanda between ethnic groups. Genocide was being committed resulting in a humanitarian disaster of appalling proportions. Initially, the international community showed hesitance to intervene.

In Resolution 918 (1994), the Security Council condemned the violence and massacre against civilians and expressed its alarm at the systematic, widespread and flagrant violations of international humanitarian law and human rights. Disturbed by the magnitude of the human suffering caused by the conflict, it determined that the situation in Rwanda constituted a threat to international peace and security in the region and, under Chapter VII, imposed an arms embargo on Rwanda.

Since the situation only got worse, the Security Council, in Resolution 929 (1994), acting under Chapter VII, authorised the member states to carry out a military operation, aimed at contributing, in an impartial way, to the security and protection of displaced persons, refugees and civilians at risk in Rwanda and to use

all necessary means to achieve this objective, stressing the strictly humanitarian character of the operation.

The military intervention was subsequently carried out under French command. By Resolution 955 (1994), the Security Council established an International Criminal Tribunal for Rwanda to prosecute persons responsible for genocide, crimes against humanity and other serious violations of international humanitarian law. Thereby the Council confirmed that such acts constitute, in themselves, a threat to international peace and security.

In the case of Kosovo (1998), in the Federal Republic of Yugoslavia, the Security Council considered a pending humanitarian catastrophe brought about by civil strife and repression against civilians a threat to international peace and security. When it became clear that both Russia and China would block by veto a Security Council authorisation for military intervention, NATO carried out a humanitarian intervention without authorisation from the Security Council (see Chapter V below). Subsequently, the Security Council endorsed the political outcome of the NATO operation.

In 1998, a violent internal conflict was developing in the province of Kosovo in the Federal Republic of Yugoslavia between Serbian government military and police forces and the Kosovo Liberation Army (the UCK). The Security Council, in Resolution 1160 (1998),

condemned the Serbian police forces for excessive use of force against civilians and the UCK for its acts of terrorism. Acting under Chapter VII, it imposed an arms embargo on Yugoslavia. The Security Council also expressed its support for, an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration. In Resolution 1199 (1998), after the situation in Kosovo had deteriorated, the Security Council stated that it was, deeply concerned by the rapid deterioration in the humanitarian situation throughout Kosovo, alarmed at the impending humanitarian catastrophe and emphasising the need to prevent this from happening.

The Council determined that the situation was a threat to peace and security in the region and, under Chapter VII, demanded among others that the Yugoslav authorities cease all repression against the civilian population in Kosovo, enable effective and continuous international monitoring in Kosovo and facilitate the safe return of refugees and displaced persons and that the Kosovo Albanian leadership condemn all acts of terrorism. Finally, it decided that should the concrete measures demanded in this resolution and resolution 1160 not be taken, to consider further action and additional measures to maintain or restore peace and stability in the region. Due to the intention of Russia and China to veto an authorisation for the use of force, additional measures were never decided upon.

In March 1999, NATO initiated a military operation to put an end to the atrocities in Kosovo. After the NATO military operation, when, as a consequence, the Federal Republic of Yugoslavia had agreed on the terms for agreement on Kosovo, the Security Council became involved again. In Resolution 1244 (1999) it welcomed the agreement between the Federal Republic of Yugoslavia and the G8 and, in accordance with the agreement, authorised, under Chapter VII, a security presence in Kosovo to enforce it.

In the case of East Timor (1999), the Security Council considered the acts of terror against the civilian pro-independence population of East Timor a threat to international peace and security. Under Chapter VII, it authorised an international military operation to restore peace, an operation which had been requested by the Indonesian government. On 30 August 1999, a referendum was held in East Timor on independence from Indonesia. The majority voted for independence. Following the results, pro-Indonesian militias, apparently supported by Indonesia, issued a campaign of terror against the pro-independence population, resulting in massive losses of human life, substantial refugee flows and internal displacement.

After international pressure, the Indonesian government accepted demands for an international military presence to restore peace in East Timor. In Resolution 1264 (1999), the Security Council expressed

concern at the systematic, widespread and flagrant violations of international humanitarian law and human rights against East Timorese civilians and stressed the individual responsibility for these crimes. Determining that the situation was a threat to peace and security, it authorised, under Chapter VII, a multinational operation, pursuant to the Indonesian request, to restore peace and security and facilitate humanitarian assistance in East Timor by all necessary measures. The operation was carried out under Australian leadership.

Despite the lack of a legal basis for humanitarian intervention without Security Council authorisation in existing international law, it is hardly realistic in the foreseeable future that states should altogether refrain from such intervention if it is deemed imperative on moral and political grounds.[101] Recognising this, the crucial questions are for example under what conditions or criteria should humanitarian intervention be considered legitimate? What kind of justification could and should these criteria provide? Is it desirable and realistic to formalise such criteria?

Among legal scholars and political scientists these questions have been discussed in recent times. The purpose of establishing criteria is to prevent the abuse of humanitarian intervention by defining

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[101] Bhikhu Parekh, 'Rethinking Humanitarian Intervention', in Jan Nederveen Pieterse (ed.), World Orders in the Making, London, Macmillan Press Ltd, 1998. P 22 -24.

conditions for its legitimate use.[102] There is a general consensus among legal scholars on a need for a set of broad criteria for legitimate humanitarian intervention, although not full agreement as to their specific application. More controversial is what function these criteria serve in the justification of a humanitarian intervention – either as moral-political reasons or as grounds for making new law. It is also controversial whether or not these criteria should be formalised, for instance by way of an international or regional declaration. If formalised in one of these ways, the criteria would tend to become a doctrine for humanitarian intervention.[103]

It is possible that some states may, in time, agree on a set of fundamental criteria to confirm them in a declaration, possibly within the framework of a regional organisation or agency. The legal status of such a declaration, however, would be weak since it would probably not be supported by a vast majority of states within the international community.

The principles for humanitarian intervention in internal armed conflict could serve one of the following functions:-

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[102] Lillich, Richard B. "Humanitarian Intervention through the United Nations: Towards the Development of Criteria." *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* Vol. 53 No. 3 (1993): 557-575.

[103] Scheffer, David J. "Toward a Modern Doctrine of Humanitarian Intervention." *University of Toledo Law Review* Vol. 23 (1992): 253-293.

- Define the circumstances under which humanitarian intervention takes place.

- Justify ad hoc (case by case) intervention in extreme cases on legal, moral and political grounds.

- Justify intervention by asserting a new right of intervention

International legal scholars prefer to regard humanitarian intervention as a violation of international law, which the international community should not accept in general, but which it may choose on a case by case basis not to condemn if the intervention is truly humanitarian and morally justifiable.[104]

The prospects for international consensus on a set of criteria for the conduct of humanitarian intervention are not too positive due to differences among legal scholars as to the exact content of the criteria, too much resistance to the legality of unilateral humanitarian intervention and too much variance in the conditions under which such interventions occur.[105] It is highly unlikely that the developing countries, which also for historical reasons attach high value to the

[104] Arend, Anthony Clark and Robert J. Beck. International Law and the Use of Force: Beyond the UN Charter Paradigm. London: Routledge, 1993, p 33.

[105] Lillich, Richard B. "Humanitarian Intervention through the United Nations: Towards the Development of Criteria." *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht* Vol. 53 No. 3 (1993): 557-575.

principle of state sovereignty, would be inclined to adopt such a set of criteria.[106] The same holds true for China and probably also for Russia.

Furthermore, from a political point of view, such a declaration on a doctrine of humanitarian intervention might provoke international tension and challenge the existing international legal order.[107] A somewhat less formal way to proceed would be to apply, on a case-by-case basis, a standard list of justifications. Such a list could be used to justify one's own interventions and to criticise those of others. Thus, the criteria could gradually be established through practice with no attempt to force others to relate to this list as a matter for decision.[108]

Humanitarian intervention is legitimate only if a state is unwilling or unable to prevent or bring to an end serious human suffering within that state resulting from gross and massive violations of human rights or international humanitarian law.[109] This will be the case if the state itself or groups supported by the state are committing atrocities

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106 Ayoob, Mohammed. "Third World Perspectives on Humanitarian Intervention and International Administration." Global Governance Vol. 10 No. 1 (2004) p 13.

107 Köchler, Hans. *The Concept of Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of 'Just War' Compatible with the International Rule of Law?* Vienna: IPO, 2001.

108 Abiew, Francis Kofi. *The Evolution of the Doctrine and Practice of Humanitarian Intervention.* The Hague: Kluwer Law International, 1999. P 52.

109 Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', International Affairs, Vol. 69, No. 3, July 1993. P 84.

against the civilian population, or in the case of weak or failed states such atrocities take place in the context of civil war or general anarchy and disorder. It is generally agreed that intervention should be undertaken only in extreme cases of gross and massive violations of human rights or international humanitarian law.

A problem is who should make the assessment that violations of this magnitude are in fact unfolding. If necessary, the state(s) intervening must initially make the assessment.[110] Prior statements by UN organs or agencies would certainly enhance the legitimacy of the intervention as would reports from other international organisations and independent human rights NGOs. Subsequent recourse to the UN, possibly the International Court of Justice, for confirmation of the assessment made could be envisaged.

Inaction on the part of the Security Council is generally accepted as an indispensable condition for the legitimacy of humanitarian intervention. Humanitarian intervention should only be considered if the Security Council fails to act due to a veto anticipated or actual by one or more of its permanent members or only if action by the United Nations has proved to be ineffective or cannot be awaited.[111]

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110 Caroline Thomas and Melvyn Reader, 'Human Rights: A Case for Caution", in Jan Nederveen Pieterse (ed.), World Orders in the Making, London, Macmillan Press Ltd, 1998. P 101.

111 Lillich, Richard B. "The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War

For this reason it is also a natural requirement that states who decide to undertake a humanitarian intervention without Security Council authorisation should at least report to the Security Council on their plans of intervention and its progress.

Intervention by a regional organisation is preferred to one by a group of states or an individual state. However it should be noted that intervention does not gain in legality under customary international law by being collective rather than individual.[112] Also the fact that more than one state has participated in a decision to intervene for humanitarian reasons does lessen the chance that the doctrine will be invoked exclusively for reasons of self-interest.[113]

In accordance with the principle of necessity and proportionality permeating Chapter VII of the UN Charter, it is generally agreed that humanitarian intervention should only be undertaken where strictly necessary and only by the minimum use of force necessary to bring

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World." Tulane Journal of International and Comparative Law Vol. 3 No. 1 (1995). P 91.

112 Fonteyne, Jean-Pierre L. "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter." *California Western International Law Journal* Vol. 4 (1974): 203-270.

113 Knudsen, Tonny Brems. *Humanitarian Intervention: Contemporary Manifestations of an Explosive Doctrine.* New York: Routledge, 2003. P 81.

human suffering to an end.[114] However, the concrete application of this principle is complex and controversial.

Diplomatic efforts should first be made to bring pressure to bear on the government violating human rights. If diplomatic efforts fail, the feasibility of imposing economic sanctions should be considered before resorting to armed intervention. As such all non-intervention remedies must be exhausted before a humanitarian intervention can be commenced.[115] Further to this, before intervention is commenced, a clear ultimatum should be given to the government of the state unless government has broken down insisting on the termination of gross and massive human rights violations.

When military intervention is considered necessary it should be used only on the minimum scale needed to redress the human rights situation and should be discontinued as soon as this limited objective has been fulfilled.

Therefore, the following principles should be observed; use of force must be proportionate to the human rights at stake, intervention should have a convincingly positive effect on human rights in the state

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114 Barry, Benjamin. "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities." Fordham International Law Journal Vol. 16 No. 2 (1991). P 78.

115 Mahalingam, Ravi. "The Compatibility of the Principle of Non-Intervention with the Right of Humanitarian Intervention." *UCLA Journal of International Law and Foreign Affairs* Vol. 1 No. 1 (1996): 221-263.

more good than harm from the intervention, the magnitude of military involvement should be proportionate to the minimum demands of the protective action, primary goal should be to remedy gross human rights violations, the intent must be to use the least amount of coercive measures necessary to achieve its purpose and to intervene for as short a time as possible, with disengagement as soon as the specific limited purpose is accomplished.[116]

The use of force should have strictly humanitarian purposes and thus in principle should not be directed against the political structures of the state. The long-term political independence and territorial integrity of the targed state must not be imperiled by the intervention. The intent must be to have as limited an effect of the authority structure of the concerned state as possible, while at the same time achieving its specific limited purpose.

In order to ensure their impartiality, there is need for complete disinterestedness of the intervening state(s). The primary goal should be to remedy gross human rights violation and not to achieve some other goal pertaining to the self-interest of the intervening state(s).[117]

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116 O'Hanlon, Michael. *Saving Lives With Force: Military Criteria for Humanitarian Intervention*. Washington, DC: Brookings Institution, 1997. P 78.

117 Roberts, Adam. *Humanitarian Action in War: Aid, Protection and Impartiality in a Policy Vacuum*. London: Oxford University Press for the International Institute for Strategic Studies, 1996. P 123.

There is probably on an abstract level a general agreement among Western legal scholars on the basic conditions for legitimate humanitarian intervention, although their concrete content, interpretation and application may be subject to debate.

These criteria will be relevant in any case of humanitarian intervention without Security Council authorisation. Whereas they go some way in narrowing the scope for arguing that a humanitarian intervention is legitimate, they do not answer the paramount political and legal-political questions; should states undertake humanitarian intervention without Security Council authorisation at all? If so, how should this option be fitted into the existing or an emerging new legal order?

Critics of this option argue that attempts to modify the existing rules would risk exacerbating the differences of opinion over these highly sensitive matters and to have a destructive rather than constructive impact on the possibility of averting victimisation of civilian populations.[118] Considering the opposition to humanitarian intervention, it may even be argued that attempts to formalize criteria for humanitarian intervention in a legally binding form or as a political doctrine would bear negatively on the possibilities for enhancing co-operation in the Security Council.

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[118] Wood, William B. "From Humanitarian Relief to Humanitarian Intervention: Victims, Interveners and Pillars." *Political Geography* Vol. 15 No. 8 (1996): 671-696.

By pursuing international or regional agreement on a declaration to the effect that there exists such a right and by defining the criteria for its application, this option squarely challenges the Security Council as the sole centre for authoritative decision-making on humanitarian intervention by seeking to establish an alternative, subsidiary framework for authoritative decision-making. The option thus aims at formalising the political and moral demands for action in the face of genocide etc. into the body of international law by creating a legal option for humanitarian intervention outside the Security Council if necessary.

Critics further argue that the option risk undermining the authority of the Security Council and thereby weakening the existing international legal order pertaining to the use of force since it strives to establish an alternative legal basis for action.

If military intervention is to be contemplated, the need for a post-intervention strategy is also of paramount importance. Military intervention is one instrument in a broader spectrum of tools designed to prevent conflicts and humanitarian emergencies from arising, intensifying, spreading, persisting or recurring.[119] The objective of such a strategy must be to help ensure that the conditions that

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[119] Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', International Affairs, Vol. 69, No. 3, July 1993. P 68.

prompted the military intervention do not repeat themselves or simply resurface.

One of the essential functions of an intervention force is to provide basic security and protection for all members of a population, regardless of ethnic origin or relation to the previous source of power in the territory.[120] In post-conflict situations, revenge killings and even reverse ethnic cleansing frequently occur as groups who were victimized attack groups associated with their former oppressors. It is essential that post-intervention operations plan for this contingency before entry and provide effective security for all populations, regardless of origin, once entry occurs.[121] There can be no such thing as guilty minorities in the post-intervention phase. Everyone is entitled to basic protection for their lives and property.

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In many cases the country in which a military intervention takes place may never have enjoyed a non-corrupt or properly functioning judicial system, including both the courts and police, or this may have deteriorated or disappeared as the state itself began to fail. Increasingly, there has been a realization about the importance of making transitional arrangements for justice during an operation, and

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[120] Martha Finnemore, 'Constructing Norms of Humanitarian Intervention', in Peter Z. Katzenstein (ed.), The Culture of National Security: Norms and Identities in World Politics, New York, Colombia University Press, 1996. P 99.

[121] Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights', International Affairs, Vol. 69, No. 3, July 1993. P 73.

restoring judicial systems as soon as possible thereafter.[122] The point is simply that if an intervening force has a mandate to guard against further human rights violations, but there is no functioning system to bring violators to justice, then not only is the force's mandate to that extent unachievable, but its whole operation is likely to have diminished credibility both locally and internationally.

Another peace building responsibility of any military intervention should be as far as possible to encourage economic growth, the recreation of markets and sustainable development. The issues are extremely important, as economic growth not only has law and order implications but is vital to the overall recovery of the country concerned.[123] A consistent corollary of this objective must be for the intervening authorities to find a basis as soon as possible to end any coercive economic measures they may have applied to the country before or during the intervention, and not prolong comprehensive or punitive sanctions.

Intervening authorities have a particular responsibility to manage as swiftly and smoothly as possible the transfer of development responsibility and project implementation to local leadership, and

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[122] Orend, Brian. "Justice After War." *Ethics and International Affairs* Vol. 16 No. 1 (2002): 43-56.

[123] Macrae, Joanna. *Aiding Peace ... and War: UNHCR, Returnee Reintegration, and the Relief-Development Debate.* Geneva: United Nations High Commissioner for Refugees, 1999. P 103 -109.

local actors working with the assistance of national and international development agencies.[124]

This operational challenge is particularly important when civilians return to territories where another ethnic group is in the majority. The Balkans and Rwanda have provided numerous examples of the difficulties, and the relatively low number of refugees and IDPs who have returned is telling.[125]

The focus of such tasks has been to assist local authorities in their own process of security sector transformation. Bilateral and multilateral donors alike have sought to influence the direction of change, establish good practices, and transfer knowledge and insights to the new authorities. The importance as well as the difficulty of such efforts to recruit and train local police and reform the penal and judiciary systems have been evident in countries as diverse as Haiti, Rwanda and East Timor.[126] The problems are especially difficult in situations where trained personnel have been killed or fled in large numbers to avoid violence.

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[124] Ibid, 103 -109

[125] Roberts, Adam. *Humanitarian Action in War: Aid, Protection and Impartiality in a Policy Vacuum.* London: Oxford University Press for the International Institute for Strategic Studies, 1996.

[126] Suhrke, Astri. "Human Security and the Interests of States." *Security Dialogue* Vol. 30 No. 3 (1999): 265-276.

Although reintegration is key to longer-term peace building, and ultimately the resumption of the path to economic and social development, the focus here is on the security and protection of civilians.[127] As reflected in Security Council resolutions and mission mandates, the key to stabilization has always been the demobilization of former combatants. The unstated purpose of stabilization measures has been to wrest power and the means of violence from local militias and warlords and to re-centralize it at a much higher level.

In other words, the success of the whole intervention process has hinged on the degree to which warring factions can be effectively disarmed. However, disarmament has been one of the most difficult tasks to implement. It has been extremely hard to collect all weapons, even at the end of an armed struggle, when the remaining conditions of insecurity create high incentives for the maintenance and acquisition of light weapons and small arms by the community at large.[128] Physical security and economic needs fuel a trade in small arms long after the withdrawal of intervention forces.

This means a range of activities from the effective marking of known or suspected anti-personnel minefields, to humanitarian mine

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[127] Lyons, Terrence and Ahmed Samatar. *Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction*. Washington, DC: Brookings Institution, 1995. P 45.

[128] Ibid. P 59.

clearance and victim assistance.[129] The establishment of the United Nations Mine Action Service, the Geneva International Centre for Humanitarian Demining and the growing network of national Mine Action Centres is proving to be a successful model for coordinated mine action from donors to mine-affected countries.

Recent experiences in operations such as Ethiopia/Eritrea, Cambodia and Kosovo have shown that early coordination of mine awareness training and the carefully planned, sequential return of refugees and IDPs, have resulted in far fewer mine casualties and victims than originally feared. Mine action integrated into post-conflict peace operations is recognized as an essential element in effective, sustainable economic and social reconstruction and rehabilitation efforts.[130]

There has been increasing demands on military and police forces during and following enforcement actions to pursue war criminals in post conflict situations. This is especially so since the International Criminal Court was established. However, the pursuit of war criminals is dogged by many complex challenges, for example, NATO commanders and politicians have been hesitant to pursue and arrest

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129 Manwaring, Max G. and John T. Fishel, eds. *Toward Responsibility in the New World Disorder: Challenges and Lessons of Peace Operations.* London: Frank Cass, 1998. P 33 - 38.

130 Ibid. P 33 - 38.

indicted war criminals because of the possible hostility and violent reactions by local populations.[131] Although some indicted criminals in the Balkans remain in hiding or are even allowed to live openly, this new operational challenge is likely to grow.

Humanitarian intervention is about compelling human need, about populations at risk of slaughter, ethnic cleansing and starvation. It is also about the responsibility of sovereign states to protect their own people from such harm and about the need for the larger international community to exercise that responsibility if states are unwilling or unable to do so themselves.

Past debates on intervention have tended to proceed as if intervention and state sovereignty were inherently contradictory and irreconcilable concepts with support for one necessarily coming at the expense of the other.[132] But studies and practices have shown that there is less tension between these principles than is perceived. There is broad willingness to accept the idea that the responsibility to protect people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereignty imposes and that if a state cannot or will not protect its people from such harm,

131 Smith, Thomas W. "Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism." *International Politics* Vol. 39 No. 2 (2002): 175-192.

132 Christopher M. Ryan, 'Sovereignty, Intervention, and the Law: A Tenuous Relationship of Competing Principles', Millennium: Journal of International Studies, Vol. 26, No. 1, 1997.

then coercive intervention for human protection purposes, including ultimately military intervention, by others in the international community may be warranted in extreme cases. The absences of a legal and political framework to guide and regulate humanitarian intervention in post cold war era conflicts which are mostly internal armed conflict have been a major constrain.

CHAPTER FIVE:

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Despite the legal, political and practical problems raised by humanitarian intervention in post cold war era conflicts, it is clear from this study that at the very least a qualified right of intervention needs to be established. To refuse to intervene at all in cases of gross violations of human rights is totally unacceptable, and to rule out humanitarian intervention in internal armed conflict completely would encourage unilateral interventions, which are inclined to abuse than multilaterally administered interventions.

The international community is repeatedly confronted with painful questions when civilian populations are victimized in never-ending civil wars or exposed to atrocities by their own governments. Many difficult choices concerning the role of the United Nations and of the international community have to be made in such cases. This decision-making process is invariably characterised by complex political and legal considerations and by weighing these considerations against each other.

Where the reasons for action seem legally imperative and politically sound; the Security Council in the past has been unable to act

effectively and timely, while at the same time avoiding jeopardizing in a fundamental way the existing international legal order, including the central role of the Security Council.

As was highlighted in this study, one of the most important constraining factors in the international handling of humanitarian emergencies is the occasional failure of the Security Council to act in situations where there is an obvious need for action.

Under current international law there is no right for states to undertake humanitarian intervention in another state without prior authorisation from the UN Security Council. Humanitarian intervention without Security Council authorisation is incompatible with Article 2(4) of the UN Charter which generally prohibits the use of force in international relations, excepting only the use of force in self-defence against an armed attack and the use of force mandated by the Security Council under Chapter VII of the Charter. Article 2(4) basically created a new legal order ("tabula rasa") as regards the use of force between states. The practice of the International Court of Justice supports this conclusion; the Court has strongly emphasised the prohibition on the use of force for whatever reason, and, arguably, has implicitly rejected the doctrine of humanitarian intervention without Security Council authorisation.

Neither does the legal argument about a state of necessity provide a special right of humanitarian intervention in extreme cases without Security Council authorisation. The legal defence of necessity is extremely narrow in scope, requiring that an essential state interest be at stake for the acting state with no comparable interest thereby being violated in the target state. Furthermore, it is in any case highly controversial whether the use of force can be legally justified as an act of necessity except in self-defence against armed attack.

As to the question whether state practice after 1945 has changed the status under international law of humanitarian intervention without Security Council authorisation it must be kept in mind that the development through state practice of a new rule of customary law allowing for humanitarian intervention without Security Council authorisation in derogation from the fundamental prohibition on the use of force would require a strong and consistent consensus among a vast majority of states in the world. State practice during the Cold War does not support the assumption that a right of humanitarian intervention (without Security Council authorisation) has become a part of customary international law. Only a few interventions could arguably be said to have been truly humanitarian, and even in these cases the intervening states were reluctant to rely on a doctrine of humanitarian intervention.

Likewise, there was no general acceptance by the world community. Indeed, state practice in this period as well as international declarations on the use of force between states rather reaffirmed the general character of the prohibition laid down in Article 2(4). Nor is state practice after the end of the Cold War as yet sufficiently substantial or accepted to support the view that a right of humanitarian intervention without Security Council authorisation has become part of customary international law.There has not been general support for a legal right of such intervention.

On the other hand, there is growing support for such a view among governments and legal experts. Furthermore, criticism of unauthorised interventions has generally been muted, and there has even been implicit support from the UN when the intervention was truly humanitarian. State practice since 1990 may thus evidence a greater acceptance that humanitarian intervention without Security Council authorisation may be necessary and justified in extreme cases. Yet, these events do not amount to the conclusion that a legal right of humanitarian intervention without Security Council authorisation has been established under international law. It is still premature to assess whether such a right may be emerging under international law.

As shown, according to current international law, the UN Security Council is the only locus for authoritative decision-making on the use

of force (including use of force for humanitarian purposes). Historically speaking, this represents an extremely important compromise between great power and small state interests. It can also be viewed as an attempt to diffuse some of the tensions between political and legal considerations, between order and justice. This compromise was reached under extraordinary historical circumstances and would probably be hard to re-establish if once undermined.

The 1990s have been marked by a remarkable progress consensus in the UN Security Council, and as long as there are reasonable hopes that the effectiveness of the Security Council may be further strengthened, the Council is an indispensable element of the international legal order that should not be easily dismissed. If, at some time in the future the UN Security Council turns out to be consistently unable to act in situations of threat to international peace and security, including humanitarian emergencies, this body will have entered on a course of self-destruction.

At the present stage, the UN Security Council is a highly desirable component of any strategy to protect victimised populations and to tackle the dilemmas of the order/justice dimension. As recent events show, however, there is evidently a growing demand for a safety valve so that gridlock in the Security Council does not thwart international attempts to avert humanitarian tragedies.

The safety valve is needed, first of all, for the sake of the victims, but also to protect the Security Council against itself. In the view of the important services which the Security Council may have to offer in the building of international rule of law, the challenge is to design the safety valve so that it will not eventually undermine the Security Council or relegate it to political irrelevance.

There are strong moral and political arguments related to the creation of a humane international legal order. These arguments speak in favour of the legitimacy of humanitarian intervention without Security Council mandate in cases where the most serious crimes against individuals take place, and the Security Council is blocked. On the other hand, such interventions, should they become legal under international law, might blur the hard - earned and now generally recognised prohibition on the use of force between states, put the fragile collective security system at risk and thus undermine basic tenets of the international legal order in its present stage of development.

In addition, the risk of abuse of a legal doctrine is real and should be taken into account when considering whether to invoke a legal right of intervention without Security Council authorisation or to simply justify intervention without Security Council authorisation case-by-case on political and moral grounds outside the law.

There is no magic formula to bring together the requirements of existing international law and the moral and political considerations which justify humanitarian intervention without Security Council authorisation. The discussion on humanitarian intervention raises questions of the utmost complexity and importance. It cannot be reduced to either political, moral or legal considerations. Of course there are rules and norms to support decision-makers, but there are also hard political and legal-political choices to be made. The challenge is to keep open the option for humanitarian intervention without Security Council authorisation in extreme cases, without jeopardising the international legal order.

RECOMMENDATIONS

It is important that humanitarian interventions in internal armed conflict to have clearly delimited goals and the goals should be made public. The goals of intervention should be limited to prevention of a humanitarian catastrophe.

The expected comprehensive damages made by humanitarian intervention in internal armed conflict should not be bigger than the comprehensive benefits expected.

The use of force in humanitarian intervention in internal armed conflict should surely follow the principle of proportionality with respect to the laws and the ethics of war.

There is need to enhancing the capacity and effectiveness of regional organizations, this seeks to attack the root causes of humanitarian emergencies by way of development assistance and conflict prevention, including a strengthening of global and regional human rights regimes. It should focus on development and strengthening of regional capabilities, for conflict management and humanitarian intervention authorised by the Security Council, creation of more evenly distributed capabilities for conflict management, including the non-military instruments of conflict management, and of closer co-ordination between global and regional capabilities in order to add to the legitimacy and effectiveness of such capabilities, thereby enhancing their deterrent value.

Acting under Chapter VIII of the UN Charter, regional organisations could be allocated a greater implementation role than today. The existence of such credible capabilities to coerce norm - breakers would tend to reduce the pressures for humanitarian intervention in both its forms, thereby minimising the need for actually activating the safety valve mechanism.

Modify existing international law by establishing, through amendment of the UN Charter to legalize a right of humanitarian intervention. This option could be pursued by justifying humanitarian intervention in such cases on legal grounds, that is by alleging an (emerging) new right of intervention under international law under specified circumstances or criteria.

This may dynamically reinforce the efficiency of the Security Council, but it does not seek to maintain the Security Council as the sole centre for legally authoritative decision-making on humanitarian intervention.

Considering how jealously the permanent members of the Security Council guard their right of veto, they are likely to oppose any such amendments that would erode their current power and status within the UN.

Establishing a right for humanitarian intervention outside the Security Council is the most far-reaching as it aims at establishing a general right of humanitarian intervention outside the Security Council on a par with the right of self-defence in Article 51 of the UN Charter.

The consequences for the existing international legal order would presumably be even more serious than in the earlier Options. The

chances of universal recognition of this Option are even smaller. Realistically, it could only seek to become a doctrine of humanitarian intervention adopted by a group of states or a regional organisation. Furthermore, it would probably have even more serious consequences for the role of the UN system and notably the Security Council than the other options. It would rob the Security Council of some of its most important tasks and give ample room for abuse by states with less benevolent motives.

The responsibility to protect implies the responsibility not just to prevent and react, but to follow through and rebuild. This means that if military intervention action is taken - because of a breakdown or abdication of a state's own capacity and authority in discharging its responsibility to protect - there should be a genuine commitment to helping to build a durable peace, and promoting good governance and sustainable development.

The UN Secretary-General described very clearly the nature of and rationale for post-conflict peace building in his 1998 report on The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa. By post-conflict peace-building, means actions undertaken at the end of a conflict to consolidate peace and prevent a recurrence of armed confrontation. Experience has shown that the consolidation of peace in the aftermath of conflict requires more than purely diplomatic and military action, and that an

integrated peace building effort is needed to address the various factors which have caused or are threatening a conflict.

There is a need for clear-cut responsibilities and a transition of responsibility from the military authorities to the civilian authorities, as soon as possible after hostilities have ceased. While it may be necessary for a short period immediately after hostilities have ceased for the military commander to assume complete administrative authority, the transition to civilian authority should take place with minimum delay. The usual process will be the appointment by the UN of a Special Representative of the Secretary-General, and the transfer of military authority to that Special Representative, with full local authority restored following elections and the withdrawal of foreign military forces.

The most strongly expressed concern essentially is over the political , legal and operational consequences of reconciling the principle of intervention with that of non-intervention. These concerns ere of three different kinds. They might be described, respectively, as concerns about process, about priorities, and about delivery, with a cross-cutting concern about competent assessment of the need to act.

As to process, the main concern was to ensure that when protective action is taken, and in particular when there is military intervention for human protection purposes, it is undertaken in a way that

reinforces the collective responsibility of the international community to address such issues, rather than allowing opportunities and excuses for unilateral action. This requires focusing, above all, on the central role and responsibility of the United Nations Security Council to take whatever action is needed.

As to priorities, the main concern was that attention in past debates and policy making had focused overwhelmingly on reaction to catastrophe - and in particular reaction by military intervention - rather than trying to ensure that the catastrophe did not happen in the first place. To redress this imbalance there is need to emphasis over and again the integral importance of prevention in the intervention debate, and also by pointing out the need for a major focus on post-conflict peace building issues whenever military intervention is undertaken. It is argued that the responsibility to protect embraces not only the responsibility to react, but the responsibility to prevent, and the responsibility to rebuild.

As to delivery, the most widespread concern of all is about the too many occasions during the last decade when the Security Council, faced with conscience-shocking situations, failed to respond as it should have with timely authorization and support. And events during the 1990s demonstrated on too many occasions that even a decision by the Security Council to authorize international action to address situations of grave humanitarian concern was no guarantee that any

action would be taken, or taken effectively. There is therefore the need to get operational responses right by identifying the principles and rules that should govern military interventions for human protection purposes.

But it is even more important to get the necessary political commitment right. It remains the case that unless the political will can be mustered to act when action is called for, the debate about intervention for human protection purposes will largely be academic. The most compelling task now is to ensure that when the call goes out to the community of states for action, that call will be answered.

The challenge is for the international community is therefore to lay down the legal and political framework for humanitarian intervention in internal armed conflict. The primary task at hand will be to establish objective criteria acceptable to majority of states that set out the legitimate situations that warrant military interventions. Without such criteria any intervention is liable to face confusion about its legitimacy, mandate, nature of the military deployments, and its rules of engagement. Therefore there is need to recognized that this challenge is as much political as it is legal, every efforts must be made to assuage the suspicions that states harbour towards humanitarian intervention in internal armed conflict.

The current absence of a legal framework for carrying out humanitarian intervention in internal armed conflict contributes to unease that states feel when considering such action. While developing a legal and political framework to regulate humanitarian interventions the purposes does not guarantee action, but it will hedge against abuse, and is a necessary condition to deter and stop humanitarian disasters in the future.

The political-legal framework should be designed in a manner that it maintains or even raises barriers to illegitimate interventions. It should define the areas, conditions, procedures for legitimate cases, and proceed as far as possible on the broad basis of consent. The old presumption against unilateral intervention out to stand. When considering collective interventions, there is need to give careful consideration to how they can be organized in such a way as to provide as much impartiality as possible.

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